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THIRD REPORT

OF THE

JUDICIAL COUNCIL OF MASSACHUSETTS

CREATED BY CHAPTER 244 OF THE ACTS OF 1924

Issued Quarterly by the
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INTRODUCTORY STATEMENT

The First Report of the Judicial Council was reprinted in the "QUARTERLY" for November, 1925, and the Second Report in the "QUARTERLY" for December, 1926. The Third Report, reprinted herein, has been filed with the Governor.

F. W. G.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

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FRANK W. GRINNELL.

Sworn to and subscribed before me this day of September, 1927.

RUDOLPH P. BERLE,
Notary Public.
(My commission expires Nov. 5, 1931.)

[SEAL]

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THIRD REPORT

OF THE

JUDICIAL COUNCIL OF MASSACHUSETTS

CREATED BY CHAPTER 244, ACTS OF 1924

NOVEMBER, 1927

(*For Index see pages 4–5*)

PUBLICATION OF THIS DOCUMENT APPROVED BY THE COMMISSION ON ADMINISTRATION AND FINANCE

3 M. 10-'27. Order No. 348

The Commonwealth of Massachusetts

NOVEMBER 30, 1927.

To His Excellency ALVAN T. FULLER,
Governor of Massachusetts.

In accordance with the provisions of chapter 244 of the General Acts of 1924 we have the honor to transmit the third annual report of the Judicial Council.

WILLIAM CALEB LORING,
Honorary Chairman.
ADDISON L. GREEN,
Chairman.
FRANKLIN G. FESSENDEN.
JOSEPH J. CORBETT.
WILLIAM M. PREST.
FRANK A. MILLIKEN.
ROBERT G. DODGE.
FREDERICK W. MANSFIELD.
FRANK W. GRINNELL.

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ACTS OF 1924, CHAPTER 244.

AN ACT PROVIDING FOR THE ESTABLISHMENT OF A JUDICIAL COUNCIL TO MAKE A CONTINUOUS STUDY OF THE ORGANIZATION, PROCEDURE AND PRACTICE OF THE COURTS.

Be it enacted, etc., as follows:

Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section thirty-four, under the heading "Judicial Council", the following three new sections: — *Section 34A.* There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The judicial council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve.

Approved April 12, 1924.

MEMBERS OF THE COUNCIL.

WILLIAM CALEB LORING of Boston, *Honorary Chairman*
ADDISON L. GREEN of Holyoke, *Chairman*

FRANKLIN G. FESSENDEN of Greenfield
WILLIAM M. PREST of Boston
ROBERT G. DODGE of Boston
JOSEPH J. CORBETT of Boston
FRANK A. MILLIKEN of New Bedford
FREDERICK W. MANSFIELD of Boston

FRANK W. GRINNELL of Boston, *Secretary*

THIRD REPORT

OF THE

JUDICIAL COUNCIL OF MASSACHUSETTS.

To His Excellency
ALVAN T. FULLER,
Governor of Massachusetts.

The Judicature Commission began its second and final report (H. 1205 of 1921) with the following quotation from Mr. Justice Riddell of the Supreme Court of Ontario:

> We . . . regard the courts . . . as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. . . . We can not afford to waste either time or money.

The act creating the judicial council which appears on the opposite page provides that the council shall "report . . . upon the work of the various branches of the judicial system."

Some of the problems involved in the administration of justice in this Commonwealth can be best visualized by considering the amount of business brought before our courts during the space of one year, the nature of that business, the courts engaged in disposing of it, and the expense involved. In this connection it should be noted that the twelve month period reported by the different courts is not exactly the same. The reports of the business of the Supreme Judicial Court are from September 1, 1926, to September 1, 1927; those of the Land Court and the Municipal Court of the City of Boston are for the calendar year 1926. The Superior Court reports are for the year June 30, 1926, to June 30, 1927, while the District Court reports are for the year October 1, 1925, to October 1, 1926. We use this report, because their report for the year October 1, 1926, to October 1, 1927, is not yet complete. This lack of unity in the statistical period covered does not, however, affect the practical utility of these figures, because the margin of error involved in their use is obviously very small.

SUMMARY OF CASES ENTERED.

There have been entered in the Supreme Judicial Court, Superior Court, Land Court, Probate Court, the Municipal Court for the City of Boston, the District Courts and Trial Justices Courts, during their last "Statistical Year" as reported, 174,878 civil cases and 240,184 criminal cases. The term "Statistical Year" is used as a matter of convenience to cover the annual period reported by the respective courts. The details of these entries are as follows:

	Civil.	Criminal.
Supreme Judicial Court:		
Entries not including appellate cases [1]	3,593	–
Full Bench (rescripts)	515	–
Superior Court	28,719	24,672
Land Court	1,209	–
Probate Courts	30,219	–
Municipal Court of Boston:		
Entries	36,500	42,652
Appellate Division	116	–
District Courts:		
Entries	73,922	170,673
Appellate Divisions	85	–
Trial Justices	–	2,187
Total	174,878	240,184
Grand total	415,062	

[1] Prerogative Writs 179
Equity 134
Petitions for Admission to the Bar 1,121
Attorney General Informations 2,159
For details as to counties see Appendix C.

This number may properly be reduced by 6 cases brought before the Supreme Judicial Court and transferred to the Superior Court for trial and 3,368 civil cases brought before the Municipal Court of the City of Boston and the other District Courts and thereupon removed to the Superior Court upon claim of jury trial. These should not be confused with appealed cases. On the other hand a single land registration petition often covers in fact several different cases, while in the Probate Courts in each estate probated, for instance, there may be various petitions, each in the nature of a separate issue and each demanding a hearing. Therefore we believe that the total entries given above are an understatement of the number of cases entered in our courts during the past year.

These totals, however, do not include 59,488 tabulatable injuries brought before the Industrial Accident Board during 1926. Nor do they include a large number of petitions some, at least, of a judicial nature dealt with by county commissioners.

COST.

The annual cost (as well as we can extract it from the reports cited in a footnote) of the courts (not including the work of the Industrial Accident Department), including therein overhead upon the assessed value of the county courthouses and their contents, is $6,116,904.21, as follows:

Gross court expenditures for the year 1926		$6,739,896 42 [1]
Credit:		
By fees, fines and forfeitures:		
To Counties	$778,663 08	
To State Treasurer	773,931 87	
To Municipalities	629,446 69 [2]	2,182,041 64 [3]
Balance		$4,557,854 78
Add 10 per cent upon assessed value of property		1,502,690 29
Add Law Libraries		56,359 14
Net cost		$6,116,904 21

The valuation by assessors of courthouses and their furniture, law libraries, probate and registry buildings in all counties of the Commonwealth, as reported to us, is $15,026,902.87.[4] We assume 10 per cent as a conservative figure for interest, depreciation and taxes. We include taxes as we believe they are properly to be considered in estimating the cost. In order not to load the courts with overhead upon that portion of county buildings devoted to the Registry of Deeds as well as the Probate Courts, we have assigned to the Probate Court one-half of the assessed value of such property.

The net cost to the Commonwealth of the Industrial Accident Department for the year 1926 was $165,235.52. The combined total direct

[1] These figures are compiled from the Fourth Annual Report of Commission on Administration and Finance for the year ending November 30, 1926; Annual Report on the Statistics of County Finances for the year ending December 31, 1926, and the Auditor's Report for the County of Suffolk for the year ending December 31, 1926.

[2] The returns of clerks of District and Municipal Courts for this year show $875,734.54 returned to cities and towns; a part of this we have assigned to the counties.

[3] Certain fines paid to the District Court of Chelsea and to the District Court of East Boston which are paid direct to the municipalities of Revere, Chelsea and Winthrop, are not included in these statistics.

[4] The details are as follows:

Suffolk County, all land and buildings	$5,738,700 00
Other Counties, courthouses and furniture	7,494,500 00
Law Libraries	670,202 87
Probate and Registry buildings, $2,247,000 (assign one-half)	1,123,500 00
	$15,026,902 87

annual cost to the Commonwealth of the courts and this Department was $6,282,139.73.

In addition to the direct cost to the Commonwealth as stated above, there is an indirect cost which falls upon the parties voluntarily or involuntarily before the courts, for lawyers, sheriff's fees, experts, witnesses, etc. This cost to parties can never be known but we believe it will easily exceed the cost of the courts to the Commonwealth.

While not a part of the cost of the courts there are other expenses that are a part of the cost of the administration of justice and may well be considered here. We allude to the annual expenses of jails, prisons, parole boards, industrial schools, etc., amounting to $4,345,436.37, as tabulated in the footnote below.[1] We include in the cost 10 per cent as overhead upon the assessable value of the jails, prisons, etc., involved, amounting (one county missing) to $9,966,016.

Considering that the 415,062 cases entered in the Courts involve every kind of human rights, not only money rights but the right to life and liberty; considering, further, that in addition to the nearly $10,500,000 direct and indirect public expenditure as above shown, the bringing and defending of these actions, civil and criminal, entails upon the parties who are thus brought into court an additional large personal expenditure for lawyers, sheriffs, fees, witnesses, etc., it is obvious that every effort should be made to see that the justice sought is rendered promptly and with as little expense and loss of time to the parties involved as is consistent with the proper functioning of the court. It is possible to abuse the word "business" in connection with our courts, but an instrument of government that involves an annual outgo as large as does our legal system has unquestionably its business side, which also demands that the money be used wisely and economically, and that the system function harmoniously and without undue delay.

SUPREME JUDICIAL COURT.

During the year beginning September 1, 1926, the Supreme Judicial Court decided 515 cases that came before it on some form of appellate process. In addition to these 515 cases there were entered in the Supreme Judicial Court 3,593 cases, of which 6 were transferred to the Superior Court and 3,587 were heard or are now pending.

[1] Annual expense of jails, reform schools, houses of correction, etc. . . $3,348,834 77
Interest, depreciation, etc. (10 per cent of $9,966,016) 996,601 60

Total $4,345,436 37

Of these entries 1,121 were petitions for admission to the bar which are referred to the Bar Examiners and take up little time of the court; 2,159 were informations by the Attorney General for failure by corporations to file returns or pay taxes. These are quite largely routine matters, disposed of without action by a judge. It is estimated by the judges that the amount of time required by other than appellate work at present is approximately the equivalent of the time of one judge.

The statistical table exhibiting the number of cases decided annually by the Full Bench of the Supreme Judicial Court over a period of a year, while it can not show the amount of work done by the court, is not without interest. The table subjoined (Appendix C), starts with the year 1874, at a time when the Justices were, as now (St. 1873, c. 40), seven in number. It will be noted that while there are ups and downs in the number of rescripts annually handed down, there has been on the whole a steady increase, the number stated mounting from 394 in 1874 to 515 in 1926. This is a 30½ per cent increase. But, as has been pertinently said: "Nowhere in this tabulated statement nor by an examination of the Massachusetts Reports themselves can you discover the constant and continuous increase in the labor of the court due to the fact that there are so many more cases decided and new statutes passed in other jurisdictions as well as here with which the court must keep itself familiar in order fully to be enlightened and fitted to handle problems as they arise. The days of John Marshall, when comparatively few decisions could be consulted to help the court in reaching its conclusions, are now long past."

It is quite true that during this period the Supreme Judicial Court has been relieved of most of its trial work (for details see First Report of Judicial Council, pages 10 to 12 inclusive), but we are satisfied that this relief is inadequate. There were 515 opinions to be written during the year 1926. This is a much larger number than is required of Justices sitting in similar appellate work in other states, according to information that we have received.

SUPERIOR COURT.

The returns of the Superior Court for the year June 30, 1926, to June 30, 1927, appear in Appendix C. It is impossible, for two reasons, to make accurate comparison between this report and those prepared by the clerks of court under the statute for the two prior years and set out as Appendix B in our Second Report. First, because the court this year is required by chapter 64 of the Acts of 1927 to give the number of cases "Pending at the end of the year" while under the prior law it was necessary to give the number of cases "untried" at the end of the year. The two

things are not the same, since a case may be "pending" at the close of the year although it has been tried. Incidentally, it should be noted some duplication is possible, as a case actually tried may afterwards be disposed of by agreement of parties or by order of court and so appear twice in the returns. Secondly, the returns (so far as they relate to civil cases) are affected by a change made recently in the dismissal rules.

The returns of the clerks of court for the Superior Court for the year June 30, 1926, to June 30, 1927, however, are obviously reassuring as to criminal cases.

On the criminal side the number of cases "pending" at the close of the statistical year is 1,469 less than the number "untried" two years ago and 107 less than the number "untried" last year. If there were among the cases "pending" at the close of the statistical year some which were in fact tried, then the margin of improvement is increased *pro tanto*. This favorable situation seems to be due mostly to the employment of District Court Judges in the trial of certain criminal cases, although it should be noted that the number of criminal cases entered in the Superior Court this year is less by 716 entries than it was the year before.

District Court Judges have sat in the Superior Court as follows:

	Days.
Year ending November 30, 1924	622
Year ending November 30, 1925	849
Year ending November 30, 1926	740

The average is 733 days, which is nearly equivalent to the time of four Superior Court Judges.

The result is very gratifying and fully justifies the employment of District Court Judges in Superior Court sessions. There is no greater deterrent to crime than prompt trials. The certainty that some sentence will follow closely on the heels of a crime is more important as a deterrent than the severity of the penalty itself. Under no circumstances should the criminal calendar become clogged. It is intolerable that the district attorney be forced to trade with criminals in order to clear his docket.

The situation on the civil side of this court is less easily analysed. There were 6,723 more civil cases "pending" June 30, 1927, than there were "untried" on June 30, 1926, and 7,809 more than were "untried" June 30, 1924, although in that year there was a much larger divorce list, owing to the fact that the Probate Courts had not then taken over so much of the divorce work as they since have done. The detailed comparison between the number of cases pending at the close of the year

ending June 30, 1927, and "cases untried" at the close of the year ending June 30, 1926, is as follows:

	"Cases Pending" June 30, 1927.	"Cases Untried" June 30, 1926.
Jury cases	43,399	39,739
Jury-waived cases	10,583	8,917
Equity	8,793	7,577
Divorce	2,148	1,967
Total	64,923	58,200

At first glance it would look as though the court had fallen behind this last year by 6,723 cases. As has been pointed out, however, "cases pending" and "cases untried" are not the same thing. But this is not the chief fault with the comparison. Because of the change in rule 62 no cases were dismissed last year under the rule or special orders while during the prior year, 9,257 cases were dismissed under the rule or order then prevailing.

There are thus contained among the "inactive" cases reported for 1927 some 9,000 or 10,000 cases which under the law prevailing in 1926 would have been dismissed but which now lie dormant on the dockets of the courts awaiting dismissal at the end of the three year period prescribed in rule 62. They should be eliminated if a fair comparison is to be made of the court's work, and their elimination would show to the advantage of the year 1927 to the extent of 2,500 to 3,500 cases.

In this connection it should be noted that there were 1,436 more cases of all kinds entered in 1927 than in 1926 and 1,729 more than in 1925, in spite of diminishing divorce entries. A comparison of these entries is not without value.

	Entries Civil Cases.		
	Year ending June 30, 1927.	Year ending June 30, 1926.	Year ending June 30, 1925.
Jury	19,406	18,282	18,117
Jury-waived	5,119	4,941	4,973
Equity	3,655	3,316	3,009
Divorce	554	759	906
Total	28,734	27,298	27,005

It will be noted that the greatest increase is in jury cases, and these are cases that need the most time and money to try.

We call especial attention to the fact that but 554 divorce cases were entered during the "statistical year." It will later on appear that 1,269 divorce cases were entered this last year in the Suffolk Probate Court alone, and that the total of entries for all the Probate Courts in the Commonwealth was 4,444 cases for the same period.

On the whole it would seem that the Superior Court in spite of increased entries has more than held its own in civil as well as criminal cases. Nevertheless, there were pending at the close of the year 64,923 cases; and if we deduct all of the "inactive" cases, there were 48,517 active cases pending at the end of the year. Ably administered as this court undoubtedly is, considering the natural annual increase of business that is bound to confront it, we do not see how the undoubted congestion in this court is to be removed unless it is relieved of a substantial amount of the work now placed upon it or the force of Judges is increased. We believe that the latter alternative is to be avoided if possible. Furthermore, in order to maintain the present situation the court is obliged to send to masters and auditors a large number of the cases (as shown on page 63), and those among the most important that come before it, especially in the equity sessions. These cases ought to be tried by the judges themselves. So tried, they would be decided more quickly and more economically and with better satisfaction to parties. Again this can not be accomplished unless and until the court is relieved of some of the less important work that is now consuming its time and energy.

LAND COURT.

The report of the Land Court (Appendix C) is worthy of attention. The number of cases in the court has increased during twenty years from 451 in 1906 to 1,209 in 1926, or 268 per cent. Yet the net cost of the court to the Commonwealth was less the latter year than the former. Although the appropriation for the court increased from $34,675 in 1906 to $95,050 in 1926 yet the fees increased in such ratio that they advanced from $15,933.12 to $74,194.72 for the same period, leaving the result as stated.

The number of cases entered is not a reliable indication of the amount of work done in the court. Land registration proceedings are *in rem*, frequently involving a number of entirely independent issues, so that a single petition often covers in fact several separate cases. Unlike proceedings in other trial courts, every case entered comes before a judge for hearing and disposition.

Proceedings to foreclose tax titles under G. L., chapter 60, are comparatively new, the statute in relation thereto being chapter 237 of the Acts of 1915 and the first petition thereunder being filed in the year 1917. The State Tax Commissioner has recently called to the attention of the various cities and towns in the Commonwealth the provisions of chapter 126 of the Acts of 1926 which require them at the expiration of two years to bring petitions to foreclose all tax titles held by them. Such action by them would result in a large and immediate increase of tax lien cases.

Since the passage of the statute increasing fees in land registration cases in the year 1923, the court has returned to the Commonwealth 71 per cent of the amount appropriated by the state. The Land Court now has jurisdiction of ten different proceedings relating to land, and only about one-third of its work consists of land registration. Inasmuch as the statutory fees applicable to land registration cases were raised in 1923 so that the land registration work is paying its way, we recommend that a substantial increase be now made in all other cases over which the Land Court has jurisdiction so that they, also, shall pay their way.

PROBATE COURTS.

As shown in Appendix C there were entered in the Probate Courts for the Commonwealth during the year September 1, 1926, to September 1, 1927, 4,444 divorce cases and 25,775 other cases. In considering the amount of work involved it should be borne in mind that when a will is filed for probate, for example, it counts one case in these statistics although it may involve many separate petitions, hearings and decrees, each in the nature of a substantially different action.

The Probate Courts are doing a substantial amount of trial work along lines identical with the Superior and other courts. Besides divorce cases the court has jurisdiction of trusts, habeas corpus, partition of land, and separate support. Jurisdiction in divorce co-ordinate with the Superior Court was given the Probate Courts in 1922. The effect of this has already been pointed out in the diminished number of cases now brought in the Superior Court and the large number of divorce cases now brought before the Probate Courts. The Probate Court is essentially a domestic relations court and there is no reason why all cases of divorce and annulment of marriage should not be placed there exclusively.

MUNICIPAL COURT OF THE CITY OF BOSTON.

There were entered in this court (see Appendix C) during the calendar year 1926, 36,500 civil cases, including poor debtor, Dubuque and small claims cases, and 42,652 criminal cases. Omitting poor debtor, Dubuque and small claims cases, the number of civil cases entered was 30,830. For the purpose of study and comparison, a table dealing with similar entries from the year 1913 to the first six months of the present year, both inclusive, has been prepared and is printed on the opposite page.

Municipal Court of the City of Boston — Civil Actions.

Year.	Entered.	Removed.	Per Cent.	All Defaults.	Per Cent of Entries.	Tried.	Per Cent of Entries.	Total Plaintiffs' Judgments.	Average Plaintiffs' Judgment, Contract only.	Heard, Appellate Division.	Per Cent of Trials.	To Supreme Judicial Court.
1913 . . .	14,005	441	3.1	7,067	50	1,735	12	$1,008,147	$115.10	74	4.2	11
1914 . . .	15,173	501	3.3	7,681	50	1,676	11	976,320	103.45	88	5.2	18
1915 . . .	16,077	401	2.4	7,848	49	1,587	10	–	–	–	–	9
1916 . . .	16,095	401	2.4	7,707	47	1,760	11	1,117,059	104.69	93	5.8	19
1917 . . .	15,552	424	2.7	7,189	46	1,745	11	1,203,926	126.58	88	5.0	10
1918 . . .	12,786	380	2.9	6,381	49	1,290	10	1,043,886	120.32	84	6.5	6
1919 . . .	12,204	408	3.3	5,511	45	1,554	12	925,275	157.46	76	4.8	24
1920 . . .	13,702	477	3.4	6,078	44	1,745	12	1,065,379	132.97	94	5.4	18
1921 . . .	18,640	677	3.6	7,302	39	2,203	11	1,563,293	146.82	93	4.2	15
1922 . . .	19,948	476	2.386	10,106	50	2,201	11	1,877,970	154.10	106	4.8	10
1923 . . .	21,805	746	3.4	10,589	48	2,397	11	2,019,262	158.49	77	3.2	20
1924 . . .	23,820	907	3.8	11,239	47	2,636	11	2,256,391	149.86	79	3.0	14
1925 . . .	26,482	1,263	4.8	13,149	49	2,661	10	2,529,877	156.28	103	3.8	18
1926 . . .	30,830	1,505	4⅞	15,184	49	2,928	9	2,980,009	163.74	92	3.1	22
1927 (½ year) . .	18,390	752	4.0	9,289	50	1,982	10	1,975,683	164.11	67	3.3	9

The jurisdictional limits in civil cases from 1866 to 1877 were $300; from 1877 to 1894, $1,000; from 1894 to 1922, $2,000; since 1922, $5,000.

The jurisdiction of the Municipal Court of the City of Boston has been since 1922 raised from $2,000 to $5,000, and it is instructive to consider the number of cases recently brought in this court in which the ad damnum or alleged claim is over $2,000 and how many of these cases the defendants have been willing to submit to the jurisdiction of this court. Twelve hundred and nine such cases were brought in the Municipal Court of the City of Boston in 1926, as follows:

Contract	531
Tort or Contract	41
Tort	623
Others	3
	1,209

Of these 204, or but 16 per cent, were removed by the defendants to the Superior Court. During the first eight months of 1927 there have been entered in this court 1,156 cases in which the ad damnum or alleged claim exceeds $2,000, as follows:

Contract	472
Tort or Contract	24
Tort	659
Others	1
	1,156

Of these, only 137, or 11.7 per cent, have been removed to the Superior Court. In other words, 84 per cent of the defendants in such cases during 1926, and over 88 per cent of the defendants in such cases brought during the first eight months of this year have been willing to submit to jurisdiction of the Municipal Court of the City of Boston.

From the foregoing table and appendices the following facts may fairly be inferred:

First, that the civil trial work of the court is increasingly satisfactory. This is shown not only by the increased number of cases actually tried, the total amount of judgments rendered, the rise in the average plaintiff's judgment, independent of jurisdictional increase, but especially by the fact that the percentage of legal review to trial is constantly decreasing. Out of 2,928 cases tried less than 4 per cent were reported to the appellate division and less than 3 per cent actually presented to that division for decision.

Second, that the percentage of cases removed to the Superior Court upon demand for jury trial is exceedingly small, and in spite of the increase of civil jurisdiction set out below has remained substantially constant.

Third, that only a small and decreasing percentage of the more important civil cases, those in which the ad damnum, or alleged claim, is over $2,000, are being removed to the Superior Court.

It was the opinion of the Judicature Commission (Final Report, page 40) that it would be wise "to allow a plaintiff to bring a suit for whatever amount he chose, in whatever court he was satisfied to have it heard, and to give the defendant an opportunity of removing the case to the Superior Court if it exceeds the present jurisdictional limits of the District Courts, if he is not satisfied that it should be heard in District Courts. Under this plan both parties could avail themselves of the courts in which both the cost and the necessary delay in disposing of the case are less." We ourselves can see no reason why, if the parties wish, they should not be allowed to try their case, no matter what the amount involved, in a District Court, rather than be compelled to take it to the Superior Court.

To the extent that parties litigate their issues in the District Courts rather than in the Superior Court, the latter court is relieved of the congestion from which it suffers. This is in itself a highly important consideration, but there is another, and that is the matter of expense to the taxpayer.

The "operating cost" per entry and per trial of cases in District and Superior Courts can be best appreciated by the following comparisons between the Suffolk Superior and Boston Municipal Court. The details of cost items considered are set out below.[1]

[1] 1. Business:

	Entered.	Tried.
Suffolk Superior, 1925–26 (1 year):		
Jury	8,690	1,074
Non-jury	2,103	337
Equity	1,886	445
Divorce	143	195
	12,822	2,051
Municipal civil, 1926:		
Entered (excludes 1,251 "small claims" and 4,426 process after judgment)		30,830
Tried		2,928

2. Cost:

Suffolk Superior (Auditor's report, p. 198):	
General expense	$607,464 73
Clerk's office	145,611 88
Judicial salaries (estimated at 10 judges)	100,000 00
	$852,076 61
Municipal civil:	
Two-thirds judicial expense (one-third criminal)	$56,334 00
Clerk's office	68,220 00
General expense	9,668 00
	$134,222 00

COMPARISON — SUFFOLK SUPERIOR AND BOSTON MUNICIPAL COURTS, 1926.

Operating cost, per entry:	
Suffolk Superior	$66 45
Boston Municipal	4 35
Operating cost, per trial:	
Suffolk Superior	415 44
Boston Municipal	45 00

The facts speak for themselves. If parties are willing to dispose of their issues in a district court, why compel them to an entry which costs the taxpayer $66.45 when they are satisfied with one that costs $4.35, or why compel to a trial which costs the taxpayer $415.44 when they are satisfied with one that costs $45?

The appellate divisions of this and the other district courts seem to b operating efficiently. Their work during the last twelve months' perio as reported by them is as follows:

	Cases Tried.	Reported, Appellate Division.	Decided, Appellate Division.	Appealed t Supreme Judicial Court.
Municipal Court, City of Boston	2,928 [1]	116	85 [2]	5
District Courts	—	82	—	13
Total	—	198	—	18

[1] Number of cases tried not reported, but the entries were more than those in the Boston cc
[2] Only "Reports Allowed" given.

We call attention to the number of appellate cases that were stoppe the appellate division and the small percentage that the parties car further to the Supreme Judicial Court.

OTHER DISTRICT COURTS.

The statistical report of these 72 courts is found in Appendix C and embraces the year from October 1, 1925, to October 1, 1926.

The total number of civil cases entered during the period, including poor debtor and Dubuque cases, small claims and insane cases was 73,922 and the total number of criminal cases, including juvenile cases and inquests was 170,673, the grand total of both being 244,595 cases of all kinds entered.

The following table shows the facts more in detail and includes the two years prior for purposes of comparison.

	October 1, 1925, to October 1, 1926.	October 1, 1924, to October 1, 1925.	October 1, 1923, to October 1, 1924.
Court writs entered	43,294	39,561	36,405
Poor debtor and Dubuque	8,650	6,908	5,912
Small claims	18,179	19,618	17,820
Insane	3,799	2,883	2,928
Criminal cases begun	161,809	168,681	163,530
Inquests	780	800	827
Juvenile cases under 17	8,084	8,155	7,938
Total	244,595	246,606	235,360

There are several gratifying conclusions to be drawn from this report. One is that only 1,853 civil cases out of all those entered were removed to the Superior Court on the ground that the defendant desired a jury trial. In other words, in fully 97 per cent of the civil cases the parties waived their right to a jury. Another is that out of the entire civil list tried (the number is not given, but it must be large) only 82 cases were reported to the Appellate Division and of these but 13 went to the Supreme Judicial Court.

While the civil business, as can be seen, has increased nearly 11,000 cases during these three years, the criminal business as measured by "Cases entered" is 6,872 less than during the year 1924–25 and 1,721 less than during the year 1923–24, while inquests and juvenile cases remain substantially the same.

TRIAL JUSTICES.

There are in this Commonwealth 10 Trial Justices, — five in Essex County, one in Hampden, two in Middlesex, and two in Worcester, — and they have no civil jurisdiction. There were presented to these justices during the year September 30, 1926, to September 30, 1927, 2,187 criminal cases as shown by Appendix C, of which 39 were appealed to the Superior Court. These justices have practically disposed of all business that has come before them. Very little work was pending either at the beginning or the close of the statistical year.

DEPARTMENT OF INDUSTRIAL ACCIDENTS.

Of the 162,239 accident reports filed with the Department during the year 1926, 59,488 were for injuries causing the loss of at least one day or one shift called in the report of the department "tabulatable injuries." Of this latter number 4,038 cases were not insured, and how many of them ripened into law suits we do not know. Neither can we know how many of the remaining 55,450 cases would in fact have gone before our courts if

they had not been adjusted before the Industrial Accident Board. But when we consider that 313 of these 59,488 cases resulted in death, 12 in permanent total disability, 1,158 in permanent partial disability and that more than 62.3 per cent of the remainder represent a temporary disability of more than a week, it is evident that the courts have been relieved from some thousands of cases that would otherwise have been brought to recover damages. It is true that the Board is not a court, but an administrative Commission, and that the chief end sought in its creation was to relieve the community from a part, at least, of the cost of the human waste attendant upon industrial operations. Nevertheless, it was in part created to relieve our courts of the congestion of cases growing out of the relation of master and servant, and as, in addition to its administrative duties, the board and its members hold hundreds of hearings each year to determine questions of fact and law arising under the Workmen's Compensation Act, its work is properly to be considered when surveying the administration of justice.

In lieu of damages and settlements that would have been paid to injured employees, if the Workman's Compensation Act did not exist, there was paid by the various authorized insurance companies operating under this Act the sum of $8,023,999.13 during the year 1926 at a gross cost of $183,956.75. As there were receipts of $18,721.24 to be credited, the net cost to the Commonwealth was $165,235.51.

COUNTY COMMISSIONERS.

In computing the cost of the courts to the Commonwealth we have not included the County Commissioners. Yet County Commissioners do have certain judicial functions to perform; for example certain tax cases can be taken on appeal to the County Commissioners instead of to the Superior Court at the option of the petitioner. Some issues, especially those relating to taxes, involve large amounts.

We have not yet received sufficient information to enable us to tabulate the work of a judicial nature performed by the County Commissioners during the past year.

FEES, FINES AND PENALTIES.

Fees, fines and penalties amounting to $2,182,041.64 paid to or imposed by the courts were returned to the Commonwealth and to its counties, cities and towns during the last calendar year. We think this sum is inadequate.

Let us consider the Criminal Courts first. Practically all fines and penalties were established in pre-war times when the dollar was about twice its present value. All wages and expenses, living and business costs, including taxes, have greatly increased since then. The cost to the criminal of violating the law has not; it alone has remained constant. The problem should be approached from the viewpoint of the minimum fine or money penalty. We recommend that there be a general increase in the amount of minimum fines or money penalty prescribed by law for the commission of crimes and misdemeanors in order to bring them into accord with the increased cost of maintaining and administering our municipalities and their institutions. At the same time there might well be a special and substantial increase in the amount of fines and money penalties upon those whose violation of law is part of an illegal business. It is absurd to fine a criminal $100 or $200 for the violation of a law when that violation is netting him a handsome income. Such a penalty is not a deterrent, it is in the nature of a modest and, to the criminal, quite satisfactory license. One way to stop crime is to make it unprofitable.

The same logic applies to fees in our Civil Courts, but other factors, especially the congestion of cases in the Superior Court enter into their consideration and they are discussed elsewhere (page 28).

DELAY IN OUR COURTS.

Delay in judicial proceedings may be placed under two headings: between entry and trial, and (when appeal is taken) between verdict in the trial court and rescript in the Supreme Judicial Court. Because we believe it so easily remedied if our citizens wish, we will consider the last of these two delays first.

DELAY BETWEEN VERDICT AND FINAL DECISION ON APPEAL.

One serious cause of delay in the trial of cases in Massachusetts is the time that elapses between the verdict in the Trial Court and the rescript in the Supreme Judicial Court. This was pointed out in our Second Report, page 77, where it is shown that in criminal cases prior to 1926 there was an average of six and two-thirds months between conviction and the allowance of exceptions and nearly eleven and one-sixth months between conviction and rescript.

According to Lord Chief Justice Hewart, speaking of criminal appeals in England (before the Canadian Bar Association, August 25, 1927, see

Appendix D, p. 131), "The average time that elapses from the receipt by the Registrar of a notice of appeal, or application for leave to appeal, till the matter is finally determined by the Court, is from four to five weeks." The same startling difference in despatch of business exists in the respective Civil Courts.

Although some of the delay heretofore existing in capital and certain other criminal cases has been removed by St. 1925, c. 279, and by St. 1926, c. 329, nothing has been done to relieve the situation in civil cases.

The causes of this delay between the nisi prius court and the Supreme Judicial Court are two: first, — that there are only six counties in which the Supreme Judicial Court sits in Boston. In the others (Berkshire, Franklin, Hampshire, Hampden, Worcester, Bristol) the court sits once a year in the respective county seats at dates fixed by law. This means one session a year for those counties, with the result that a case tried in the Superior Court in the fall or early winter in these counties can not be heard upon appeal or bill of exceptions in the Supreme Judicial Court for nearly a year. Nay, more than this, owing to the necessary delay in obtaining the stenographer's minutes of the case, preparing and printing a bill of exceptions, if a case is tried in July or even in May or June, it is often impossible to be heard before the Supreme Judicial Court until a year from the following September.

This cause of delay can be readily removed if the people wish. Let these eight counties be added to the six that compose the court for the Commonwealth and then their cases can be heard as soon as they are ready. Two objections to this that we have heard are the expense of counsel in coming to Boston and the possible delay there while waiting for the case to be heard. This latter objection can be met by providing that for the accommodation of outlying counties, certain days be set aside for the respective counties on which cases from these counties will take precedence over all other cases. In this way counsel from such counties would be sure of a hearing on the day assigned and could return home that same night. It is true that in the case of some counties counsel would need to come to Boston the night before the hearing and there would be the expense of a hotel bill as well as carfare. But we urge that this expense is small when compared with the total cost of the litigation and in any event should not stand in the way of this needed reform. Unless and until this change in our practice is effected it will be impossible to shorten this long delay between the courts.

Inquiry has been made among attorneys in various parts of the Commonwealth and we find among them a very strong approval of this suggestion.

We recommend that this change be made and annex herewith the draft of a bill, in Appendix A, page 80, designed to give effect to our recommendation.

The second cause of delay is the Bill of Exceptions. The trouble lies with the provision (Gen. Laws, chapter 231, sec. 113) that "The Exceptions shall be reduced to writing in a summary manner." In theory this is good. The defeated party should make a brief, concise statement of the issues presented and the evidence involved. In practice the result is otherwise. The defeated party not infrequently states the evidence as he would like it to be and not as it is. This involves hearings before the court in an attempt to settle the bill and the parties are sent away, urged to reconcile their differences. If the court dismisses the bill as not conformable to the facts, then the appellant can petition to have his bill allowed and there are long delays and trials before that issue is settled. Something of what can happen is seen in the Sacco-Vanzetti case where about three and one-half years intervened between the verdict and the settling of the bill of exceptions. Of course other factors entered into this delay, but the fact is illuminating.

The possibility of this delay in capital and certain other criminal cases, of which shrewd criminal lawyers have understood the import, is now abolished. As stated elsewhere these cases can go up to the Supreme Judicial Court on the stenographer's minutes. This is the method followed in England and in some of our states. The cause of similar delay in civil cases can now be abolished in a similar way. From the stenographer's minutes all can be omitted that both parties agree is immaterial. The whole case can then be placed before the Supreme Court within a short time after trial. We believe that the diligence of counsel can be relied upon by the court to point out the salient evidence, relied upon by them to support their contentions, and that the Supreme Judicial Court would not in fact find its work materially augmented. Of course the procedure would be of limited assistance to those counties that now have a session once a year in their county seat, — unless our prior suggestion of a single sitting for the Commonwealth embracing all counties is adopted.

Provision should be made for notice of appeal to be given within a limited time by the defeated party to an action, the prompt filing in the Appellate Court of all papers relating to the case and, as soon as ready, the filing there of one or more copies of the evidence, in the form of question and answer (unless the parties agree to a statement of the case in another form) omitting such part as both agree is not germane to the issue involved. Thereupon after the lapse of days from the filing of the evidence the case should be ready for argument. If our

suggestions are followed we believe that the delay now existing between the nisi prius and Supreme Judicial Court will be reduced to a minimum.

We submitted a draft act on this subject in our Second Report, page 112.

DELAY BETWEEN ENTRY AND TRIAL.

This is especially the problem of our Superior Court. As we have shown elsewhere (pp. 12–14) this court has probably fully held its own this last year, in the sense that it has disposed of the equivalent of as much business as has been newly presented to it during that period. But it starts the new year with 64,923 cases on hand, of which 48,517 are marked active. Considering the normal annual increase of entries in our courts under existing conditions, it is difficult to see how our great trial court with such a handicap can be expected to catch up with its docket unless something is done to relieve the congestion.

We have spoken of this as a problem of our Superior Court. There is nothing mysterious about this problem. It is a plain business proposition. We have already stated that the court is ably administered; it is, under the rules governing and limiting its output, functioning at capacity. But it has got more orders than it can fill, and, unlike most business concerns at the present time, it will continue to have a surplus of orders. What is to be done? An ordinarily well managed business concern would find out first if anything is slowing down production, and if there is would eliminate it. Having settled that point and done all it could to establish maximum efficiency, then if orders could not be filled, a sound management would have to decide between enlarging its plant and limiting its orders.

Suppose we consider the former proposition first. The object in a trial is to ascertain the truth. We select judges to conduct trials because of their learning and assumedly special qualifications to do just that. But we give them no power to aid the jury in ascertaining the truth by any expression of their own views as to the facts at issue. The lawyers on both sides can and very properly do argue to the jury the views of the evidence favorable to their respective clients. But the jury look in vain for assistance from the only trained disinterested mind participating in the trial. Is a judge under such circumstances functioning as a judge or is he refereeing some contest? This matter was fully considered by the Judicature Commission of 1919 (p. 85) who recommended that section 81 of chapter 231 of the General Laws be repealed. The repeal of this section was also recommended by Your Excellency in your address to the Legislature in 1927 and by Attorney General Benton in his report for 1926, page 13. A majority of the Council (Mr. Mansfield dissenting and Judge Prest reserving his right to dissent) renew this recommendation for

reasons which, together with Mr. Mansfield's reasons for dissent, are stated elsewhere in this report.

Is our plant out of balance? Can we shift some of these orders to another department? For years we have been placing more work from time to time upon the Superior Court. This year we are recommending that the Legislature give it still more work to do. How about our District Courts? We have 72 of them and so far as we have increased their jurisdiction they have given satisfaction. While it is true that the higher courts should try the more important cases, if the parties desire, yet if parties prefer, or are satisfied, to try their cases in the District Courts why not let them? We call especial attention to what is shown by statistics (pp. 17, 19, 20) as to the work of the Municipal Court of the City of Boston and the other District Courts.

The logic of these statistics is persuasive and we recommend that jurisdictional limits be removed from the Municipal Court of the City of Boston and all the other District Courts, at the same time providing as now for removal of the case by a defendant to the Superior Court upon demand of jury trial, and, if the ad damnum or alleged claim exceeds the present jurisdictional limits, for removal for hearing before a Justice of the Superior Court if so desired. There is sound reason to believe that this will afford substantial relief to the Superior Court (see First Report of Judicial Council, p. 47; Second Report, pp. 4–7). As pointed out by Chief Justice Bolster in an address in 1915, discussion usually centers about cases which are tried, and we forget the large number of cases that never come to trial, but which are disposed of with greater or less expense, according to the rules provided for such disposal. One of these rules, which seems too expensive for the public, is the arbitrary jurisdictional limit in these civil cases.

In the address above referred to, Chief Justice Bolster said, referring to conditions in 1915 in the Boston court: —

> The municipal court tries only 1 in 8 of its entries, the Superior Court scarcely more than 1 in 6 of its civil law entries. The large bulk of the entries in both courts are cases brought not for the determination of disputed rights, but for the enforcement of known rights. The proper handling of such cases in the courts is just as important to community well-being as the correct trial of causes. When you come to deal with large numbers of these cases, in thousands, putting little tax upon the judicial, but much upon the clerical, force, it seems to me the public has a right to say that those cases shall be handled in a court which can handle them with as little public cost as possible, consistently with the safety of litigants.

We submitted a draft act on this point in our First Report at page 145. Divorce cases do not now take up much time in the Superior Court

but they do take up some time. As can be seen (p. 14) more than 80 per cent of the divorce cases entered last year were entered in the Probate Courts. They properly belong in the Probate Court and we have recommended (p. 15) that the Probate Court have exclusive original jurisdiction of cases of divorce and annulment of marriage.

Bills to reach and apply are really actions at law brought on the equity side of the court to reach property not otherwise reachable as security for the judgment, and we see no reason why they should not be brought in the District Courts provided that the amount sought to be recovered be under the jurisdictional limits of the court.

We have already (p. 23) alluded to fees and fines in connection with what has been said about Criminal Cases and have heretofore recommended that fees in Civil Cases be increased (Second Report, p. 47) in the Supreme and Superior Courts. As a matter of policy in order to attract to the District Courts as much business as possible and thereby relieve the Superior Court, we do not recommend an increase of fees in the District Courts. Otherwise we can see no reason why all fees should not be increased as a matter of course certainly to the extent of taking up the loss due to the depreciated dollar. But our recommendation does not stop there.

It seems to us that when fees for civil trials are established four principles should be borne in mind: First, that if there are two courts qualified to try their cases and they choose the more expensive, then parties should pay more for the more expensive service. Notoriously the per case cost in the Superior Court is greater than in the District Courts; it is equally notorious that in the Superior Court the cost of trial by jury is far in excess of the cost of trial before a judge. Second, that if the service rendered by the court effects the devolution of an estate, adds to the value of property, serves to furnish parties with evidence of title, or otherwise increases the value of the party's possessions, then a charge should be made which should cover the cost of the service. Third, that it is dangerous to make the cost of bringing suits so low that it is an inducement to speculative litigation. Our courts are full of such litigation at the present time, as indicated by the 9,000 or 10,000 cases that have been dismissed annually in the Superior Court for lack of prosecution and the large number that are settled annually by parties to buy their peace. Fourth, that a person or party bringing a groundless suit or setting up a groundless defense should pay the entire reasonable expenses to which his adversary has been subjected owing to his conduct; this means not only the expense of witnesses, etc., but also a reasonable attorney's fee to be established by the court.

We have already (Second Report, p. 47) made a recommendation as to fees that we believe would be just to parties and to the Commonwealth and at the same time would materially relieve the congestion in the Superior Court.

Unless some of these recommendations are followed, or unless if followed they afford the relief sought, then we shall be compelled to enlarge our staff and plant or limit orders. As pointed out below our present staff of judges and others exceeds our courthouse space, especially in Suffolk.

Enlarging our staff means more judges, more court officers, etc. We have tried this before and are no better off to-day than when we tried it; if anything we are worse off. We have met with no student of our judicial system who believes this to be a solution.

Shall we limit orders — check litigation at its source? We did that in certain master and servant cases; we created an Industrial Accident Department and made it attractive for parties to take their cases there. But the automobile has come, and pretty nearly every bump and scratch involving an automobile becomes a piece of litigation. To-day the volume of this litigation is steadily increasing and it is doubtful if, without a constitutional amendment, these automobile cases can be taken from the courts. But, if they can, what assurance have we that some other fertile source of litigation will not be found?

THE NEED OF MORE COURT HOUSE SPACE IN SUFFOLK COUNTY.

The greater part of the litigation of the entire Commonwealth takes place in the Suffolk Court House in Pemberton Square.

We again repeat the opinion expressed last year, as well as the year before, that "The present congestion in the Suffolk County Court House . . . is an obstacle to the administration of justice." Additional accommodations are a pressing public necessity. We urge legislative action without further delay.

In the meantime, we suggest that rooms for the more pressing needs requiring little or no making over of such rooms, be leased by the county in office buildings in the downtown section of Boston as near the court house as practicable, for such temporary quarters. Some of such rooms might be used for masters and auditors. Within the memory of men still in practice the jury-waived sessions in Suffolk were held in offices on Court Street opposite the old court house which was outgrown before the present court house was built. We think the present condition of the Suffolk Court House warrants similar action now.

Whatever views may be entertained as to the best future building plans, the detailed "survey" of the needs of the various courts and offices in the Suffolk Court House which was made at the request of the legislature by the special commission of 1925 in its report (H. 349 of 1926) should be read. The chief justices of the various courts and the various clerks and other administrative officers meet this housing problem at almost every turn. The special commission referred to said in 1925: "At least six additional court rooms for jury sittings with twelve additional jury rooms should be provided as rapidly as it can be done." The Municipal Court of the City of Boston, in which the civil business has more than doubled in the last fourteen years, the entries mounting from 14,405 in 1913 to 30,830 in 1926 (with the tide still rising), needs several more court rooms for civil business, with proper consultation rooms, and several court rooms also for criminal business. We have elsewhere emphasized the needs of the Supreme Judicial Court. These illustrations are mentioned merely as typical of the condition of every court and record office in the building. We mention the conditions in the Suffolk County Court House only because we believe that condition to be the worst in the Commonwealth.

REPORT ON MAJORITY VERDICTS IN CRIMINAL CASES, REQUESTED BY THE LEGISLATURE.

In your second inaugural address, Your Excellency made the following recommendation:

> Juries in criminal cases, except those growing out of the killings of human beings, should not be required to arrive at their decisions unanimously. The agreement of eleven jurymen should be sufficient and the fact that a single juryman for some reason does not agree with his fellows should not result in forcing another trial. I recommend legislation to bring about this change.

This suggestion was considered by the Committee on Constitutional Law and was then referred by the legislature to the Judicial Council with the request for a report.[1]

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[1] RESOLVES, CHAPTER 10.

RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL IN RELATION TO JURY VERDICTS IN A CERTAIN CLASS OF CRIMINAL CASES.

Resolved, That the judicial council is hereby requested to investigate and consider the advisability of changing in respect to a certain class of criminal cases the present general requirement of unanimity in the verdict of a jury, as suggested by his excellency the governor in his inaugural address to the general court, printed as senate document number one of the current year, and to include its conclusions and recommendations of relation thereto, and drafts of such legislation and which amendments to the constitution of the commonwealth as may be necessary to give effect to the same, in its annual report for the current year. [*Approved March 28, 1927.*

Several proposals for a constitutional amendment to allow majority verdicts in civil cases were submitted to the Constitutional Convention in 1917. The debate was very full and reflected the views of the convention both as to civil and criminal cases. The first significant fact in this connection is that no one proposed an amendment relating to criminal cases, but the discussion reflected an even more emphatic negative as to such cases than that voted as to civil cases.

In substance the two proposals suggested were *first*, that the legislature might provide that the agreement of less than the whole jury shall be sufficient to authorize a verdict in civil cases; *second*, that the legislature might provide that after twelve hours deliberation the agreement of five-sixths of a jury shall constitute a verdict in civil cases. The Committee on Judiciary reported against both proposals. The whole discussion, which covers forty-six pages and should be read carefully by those interested, appears in Volume I of the Convention Debates, pages 389–435. It deals with the subject fully from every point of view. The first proposal was rejected without a roll call. The second proposal was rejected by vote of 30 to 150.

So far as criminal cases are concerned, we have obtained statistics which indicate that disagreements of juries have not been so prevalent as to suggest the need of a radical change in our time-honored practice. In the ten years from October 1, 1917, to October 1, 1927, 8,296 criminal cases were submitted to juries in Suffolk County, and there were disagreements in only 201 of these cases, *i.e.*, in less than one case in forty. In Middlesex County, in the same period, 3,276 criminal cases were submitted to juries, and in only 85 of these cases were there disagreements. Many of the disagreements would not be prevented unless the law should go to the extent of providing for verdicts by a mere majority. There is nothing in the statistics furnished us and printed in a footnote, which shows that the proportion of cases in which the jury fails to agree is increasing.[1]

[1] Results in Criminal Cases submitted to Juries, October 1, 1917, to October 1, 1927.

Year.	Suffolk County.			Middlesex County.		
	Verdict, Guilty.	Verdict, Not Guilty.	Disagreements.	Verdict, Guilty.	Verdict, Not Guilty.	Disagreements.
1917–18	167	174	11	41	61	2
1918–19	191	173	10	47	32	–
1919–20	157	244	16	52	37	–
1920–21	176	309	5	50	46	3
1921–22	275	435	19	55	59	8
1922–23	368	652	28	135	182	3
1923–24	455	589	18	252	293	12
1924–25	579	785	35	178	224	23
1925–26	580	843	31	361	319	26
1926–27	350	503	28	347	420	8
Total	3,298	4,797	201	1,518	1,673	85

Total cases submitted to juries, Suffolk County, 8,296.
Total cases submitted to juries, Middlesex County, 3,276.

As we have also an interesting report of the results of murder trials in Middlesex County from 1917 to 1927 we insert it in Appendix C.

We believe that the principle of unanimity is a sound one both in civil and criminal cases, that it should be retained in Massachusetts, and that the reasons in favor of it, which are set forth more at length in the discussions referred to, far outweigh the arguments on the other side. We are aware that some states have modified the unanimity requirement (see the debate referred to, page 395), that in Scotland, where the jury consists of fifteen men[1] serving without pay or expenses, a majority verdict is allowed (see report on "Criminal Procedure in Scotland," Mass. Law Quart. for August, 1920, pp. 442–443, 451), and that the National Crime Commission has included a proposal similar to that of Your Excellency among its recommendations, but, in our judgment, the interest of justice will be better served and the confidence of the public better assured in the long run if the principle of unanimity is adhered to.

REPORT REQUESTED BY THE LEGISLATURE ON RESPITES IN CAPITAL CASES.

Your Excellency's second inaugural also contained the following recommendation:

> At present it occasionally happens in capital cases, after the courts have set the period within which the sentence pronounced by them shall be carried out, that hearings on exceptions or other court proceedings necessitate postponing the execution of the sentence. Strangely enough the courts themselves have no power of postponement in such cases, and were it not for the intervention of the Governor the accused might be executed before the courts had finally determined the questions by law presented. The Governor has nothing to do with court proceedings and the state of the law which requires his intervention under these circumstances should not continue. The power of respite should at such times belong to the courts. I am informed that the necessary change can be brought about only by an amendment to the Constitution.
>
> I recommend that the necessary proceedings be instituted to place the courts in complete control of this matter.

Thereafter a bill was reported and passed both houses of the legislature. It was then recalled by the Senate from Your Excellency's consideration

[1] Five special jurors and ten common jurors, the difference being based on amount of property owned.

and a legislative order adopted[1] requesting the Judicial Council to consider both your recommendation and the bill numbered Senate 264. Senate 264 provided for the insertion in G. L., c. 279, of a new section, as follows:

SECTION 49A. The justice who presided at the trial of a case in which a verdict of guilty of murder in the first degree was returned by the jury in which the sentence of death has been imposed may, for cause deemed sufficient by him, summarily and without notice, from time to time and for definite and stated periods, stay the execution of death sentence pending the final determination of any question of law or fact arising in said case.

A second section contained a slight change of section 45 of said chapter 279 to make it consistent with the above provision.

The Statutes of the United States give the courts the power to stay execution of a sentence where any judicial question remains to be decided by the federal court.

U. S. Code, 1926, Title 28, sec. 350, par. 3, being R. S., sec. 1008, as amended by the Act of February 13, 1925, c. 229, sec. 8, 43 Stat. at L. 940, provides that —

In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

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[1] LEGISLATIVE ORDER.

SENATE, April 12, 1927.

Ordered, That the judicial council be requested to investigate the subject-matter of current Senate bill number two hundred and sixty-four relative to stay of execution in capital cases, and also the recommendations of His Excellency the Governor in his inaugural address, printed as current Senate document number one, under the heading "Authority to Grant Respites", and to include its recommendations in relation thereto, with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

Sent down for concurrence.

WILLIAM H. SANGER, *Clerk*.

H. R., April 14, 1927.

The House concurs.

JAMES W. KIMBALL, *Clerk*.

We see no reason why our state courts should not have power to grant a similar stay and relieve the executive of a burden which may properly be placed upon the courts as incidental to their judicial functions. Senate 264 proposes to give this power to the trial judge.

If there is an appeal in a capital case as there is very apt to be, sentence of death is not imposed until after the appeal is disposed of by the Supreme Judicial Court. We recommend hereinafter that motions for a new trial or any other proceeding subsequent to the entry of an original appeal in the Supreme Judicial Court should be made directly to that court. If this recommendation is adopted or, even if it is not adopted, we think that in view of the common misunderstanding and criticism of delays in criminal cases, if the Governor and Council are to be relieved of the necessity of granting such respites, the community will be better satisfied of the need of them if they are granted by the Supreme Judicial Court. The number of cases in which such respites are needed is small. While, as we have pointed out, the Supreme Judicial Court needs relief, yet the better public understanding of procedure in capital cases is of such importance that we think this power should be given to them rather than to the trial judge. Ordinarily the question whether the respite shall be granted will be clear and will not involve any serious interruption of their other work. We recommend that the Supreme Judicial Court be given this power to grant respites pending judicial action in such cases.

Your Excellency suggests that a constitutional amendment would be necessary to confer this power on the court but we do not believe this to be the case. Of course, the executive power to grant a respite cannot be restricted by statute but such a statute as is suggested would not restrict it. It would merely extend the judicial powers beyond the sentence by making the sentence conditional to the extent of being subject to stay by the court while any judicial question remains to be decided, in the same way that the probation statutes extend the powers of the District Courts to suspend the execution of sentence after it is imposed. (See G. L., c. 279, §§ 1–3.) The probation system of the District Courts has been in operation for many years and Congress has recently adopted a similar system for the Federal Courts. We see no ground for doubt as to the constitutionality of such statutes. As a practical matter we believe a statute giving the court power to grant respites pending judicial action would be a more businesslike arrangement which would leave the powers of the Governor and Council untouched so that they could grant such further respites as might be needed pending their consideration of any action under the pardoning power. We submit the following draft of a new section, 49A of G. L., c. 279:

The execution of a sentence of death may be stayed from time to time for definite and stated periods by the supreme judicial court, or a justice thereof, pending the final determination of any judicial question arising in or out of the case in which the sentence is imposed.

REPORT REQUESTED BY LEGISLATURE ON HOUSE BILL 585 RELATIVE TO OPERATING MOTOR VEHICLES.

By legislative order,[1] the Council was requested to investigate House Bill 585 and to include its recommendations with drafts of legislation in its report.

House 585, introduced by George F. James (which passed both houses and, after being submitted to the governor, was recalled by the Senate), proposes to amend G. L., c. 90, § 24, as heretofore amended by inserting after the word "so" the words "wilfully or negligently," so as to read as follows:

SECTION 24. Whoever upon any way operates a motor vehicle recklessly, or while under the influence of intoxicating liquor, or so *wilfully or negligently* that the lives or safety of the public might be endangered . . . shall be punished by a fine of not less than twenty nor more than two hundred dollars or by imprisonment for not less than two weeks nor more than two years or both. . . .

The bill is intended to avoid the liability of perfectly innocent and well-intentioned careful persons to criminal proceedings which is now possible under the literal meaning of the statute that has been upheld by the Supreme Court. The issue appears by reference to the opinion of the Supreme Judicial Court in Com. *v.* Pentz, 247 Mass. 500, especially at pages 509–510, where Chief Justice Rugg says:

The statute according to its plain words makes the act of operating a motor vehicle on a way "so that the lives or safety of the public might be endangered" a criminal offence. It is that act which is penalized. The intent with which the act is done is an immaterial factor. It is irrelevant whether the act is negligent, or not. Although it may be difficult to conceive of the operation of a motor vehicle on a way so as to endanger the lives or safety of the public which does not at the

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[1] LEGISLATIVE ORDER.

SENATE, April 11, 1927.

Ordered, That the judicial council be requested to investigate the subject-matter of current house bill number five hundred and eighty-five, relative to the negligent operation of motor vehicles, and to include its recommendations in relation thereto, with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

Sent down for concurrence.

WILLIAM H. SANGER, *Clerk*.

H. R., April 14, 1927.

The House concurs.

JAMES W. KIMBALL, *Clerk*.

same time involve some element of negligence, nevertheless, the statute says nothing about negligence. Therefore, the question of negligence is foreign to the issues raised under the indictment. The only fact to be determined is whether the defendant did the prohibited act. This belongs to the class of statutes, of which there are many instances, where the General Court, legislating for the common welfare, has put the burden upon the individual of ascertaining at his peril whether his conduct is within the sweep of a criminal prohibition. The performance of the specific act constitutes the crime. The moral turpitude or purity of the motive by which it was prompted, and the knowledge or ignorance of its criminal character are immaterial on the question of guilt. Commonwealth *v.* Mixer, 207 Mass. 141, where many such statutes are reviewed. Commonwealth *v.* Sacks, 214 Mass. 72. Commonwealth *v.* Lanides, 239 Mass. 103. Attorney General *v.* Tufts, 239 Mass. 458, 500. United States *v.* Balint, 258 U. S. 250, 252. Griffiths *v.* Studebakers, Ltd. (1924) 1 K.B. 102. It follows that the first five requests of the defendant for instructions, to the effect that there must have been on the part of the defendant an intent to endanger the lives and safety of the public, or wanton, reckless or foolhardy conduct, or deliberate disregard of the safety of others, or gross negligence, were denied rightly.

Following this case in the still more recent case of Com. *v.* Mara, Adv. Sh., p. 1781, decided October 14, 1926, the court said:

Under the charge the jury could convict if they found that the defendant, by the manner in which he operated his car, created a reasonable possibility of danger to the lives and safety of the public, and if he was by reason of the manner in which he operated the car in whole or in part the cause of that danger.

Again, in Com. *v.* Vartanian, 251 Mass. at p. 358, the court said:

The operation of a motor vehicle in violation of the statute alone constitutes the offence. Criminal liability does not depend upon negligence or the intent with which the act is done. (Cf. Com. *v.* Dzeweican, 252 Mass. at 130. Com. *v.* Coleman, 252 Mass. at 243.)

Under the statutes, therefore, a man may be criminally liable to imprisonment under circumstances which, if any damage resulted to other persons, would not subject him to a liability for damages in a civil proceeding. The judges of the district courts find great difficulty in administering the statute and some of the judges of the Superior Court, we understand also find it difficult to explain to a jury what it means.

Some officers who prosecute such cases before juries feel that the statute is a valuable one. Others think it would be better if the statute were made clearer in some such way as is suggested by House Bill 585. In the opinion in the Pentz case above quoted, Chief Justice Rugg says: "Although it may be difficult to conceive of the operation of a motor vehicle on a way so as to endanger the lives or safety of the public which does

not at the same time involve some element of negligence, nevertheless the statute says nothing about negligence."

We do not think the legislature could have intended to subject a man to criminal liability for imprisonment if by accident a situation arises without fault on his part which happens to be dangerous to the public on the highway, and yet this absolute criminal liability, or something so near it that it is difficult for judges to discriminate in the application of it, seems to be the meaning of the statute. Of course, a law of such uncertain meaning in its application is bound to result in appeals. When a case gets before the jury we understand that it is difficult to get a conviction unless the jury feel that the defendant ought to have used better judgment than he did under the circumstances. But unless this judgment of the jury amounts to the finding of negligence as a matter of common sense, then the crime seems to be one which is not defined by the statute but is simply an instruction to the jury to do about as they please in the matter. The tendency to create criminal liability in cases in which there is no criminal element or intent, express or implied, seems to us mistaken. The only justification for it, if there is any, is in some cases where experience shows that the mere happening of the fact is almost invariably evidence of its criminal character.

The proposed amendment in House Bill 585 would add the words "wilfully or negligently." We see no need of anything except the insertion of the word "negligently." If any one "wilfully" operates a car "so that the lives or safety of the public might be endangered" we think the courts and the jury may be safely trusted to find him guilty within the common-sense meaning of the word "negligently" thus inserted. Accordingly we recommend the statute be amended so as to read:

> Whoever upon any way operates a motor vehicle . . . so negligently that the lives or safety of the public might be endangered. . . .

SUGGESTED CHANGES IN THE PRACTICE IN MURDER CASES.

The extraordinary length of time which elapsed between the conviction of Sacco and Vanzetti and their execution, as well as certain of the proceedings in the case, illustrated in a striking way some serious defects in our methods of administering justice in murder cases. While these defects have not been revealed to any very noticeable extent in earlier cases they will always be likely to come to the fore unless our practice is changed in certain respects. We have obtained from the clerk a copy of the docket entries in the Sacco-Vanzetti case, which is printed in Appendix C, page 100. In connection with that case the governor of the

Commonwealth said, in a public announcement: "The delays that have dragged this case out for six years are inexcusable." No one can gainsay the truth of this statement. It will be inexcusable if steps are not taken to prevent any recurrence of such a situation.

The prime causes of the delay appear to have been the following:

1. The necessity of embodying in the bill of exceptions on which the case first went to the Supreme Judicial Court a statement of the evidence in narrative form, which statement had to be agreed to by counsel so far as possible and in other respects settled by the trial judge.

2. The right now existing in murder cases to file motions for a new trial at any time up to sentence.

3. The right to appeal from any decision of the trial judge upon any alleged question of law arising upon a motion for a new trial, and thus to take the case repeatedly to the full bench.

4. The difficulty which confronted the governor in dealing with the application for a pardon or commutation of the sentence and led him to conclude wisely that a thorough investigation and review of the case should be conducted.

We proceed to deal with these matters in their order.

1.

The first cause of the delay in this case has already been eliminated by statute. In murder cases, as well as in certain other criminal cases, it is no longer necessary that months should be spent by counsel in the effort to agree upon a narrative statement of the evidence or that protracted hearings before the trial judge should be required for the completion of the statement. By St. 1925, c. 279, it is provided that murder and manslaughter cases which are taken to the Supreme Judicial Court shall go there on appeal and not on a bill of exceptions, and that the evidence shall be submitted to that court in the form of a typewritten transcript of the testimony exactly as given at the trial and reported by the court stenographer. The amount of time which this new procedure saves is illustrated by a comparison of the significant dates in the Sacco-Vanzetti case with those in the so-called car barn cases to which the Act of 1925 was applicable. The dates were

Sacco-Vanzetti case	Verdict, July 14, 1921. Entry of case in S. J. C., Oct. 2, 1924.
Car barn cases	Verdict, Nov. 29, 1925. Entry of case in S. J. C., Jan. 21, 1926.

Upon the recommendation of the Judicial Council the provisions of the Act of 1925 were extended to certain other criminal cases by St. 1926, c. 329.

2.

Before 1922 our statutes provided that motions for a new trial in murder cases, as in other criminal cases, must be filed *within one year* after the sitting of the court at which the trial took place and also provided that they must be filed before sentence. This provision limiting the time for such motions had been in effect for many years and we are not aware that there was any serious complaint regarding it until the so-called Rollins case where, after the year had expired, a convict in Pennsylvania confessed that the crime had been committed by him. He was pardoned by the governor of that state so that he could come to Massachusetts for trial. When he arrived here he retracted his confession and was acquitted by a jury. Meanwhile the legislature, in response to the agitation caused by the case, changed the law, by St. 1922, c. 508, so that motions for a new trial in murder cases may now be filed at any time before sentence, no matter how long the sentence may be delayed. In the Sacco-Vanzetti case the defendants were thus enabled to file as many as seven successive motions for a new trial. While the new method of taking murder cases to the Supreme Judicial Court on appeal, inaugurated by the statute of 1925 referred to above, will greatly expedite proceedings and should result ordinarily in the imposition of sentence in materially less than a year after the trial, exceptional circumstances may cause a delay beyond that period, so that we deem it of importance that St. 1922, c. 508, should be repealed and the former one year limit be restored. In recommending a return to the former one-year limit we have in mind that in the very rare case in which new evidence of real importance, throwing doubt upon the guilt of the defendant is discovered too late for submission to the court, the opportunity to apply to the governor for a pardon or commutation of the sentence furnishes all reasonable protection against a miscarriage of justice.

3.

Under our present practice it is possible for zealous counsel, after a verdict of guilty has been rendered in a murder case, to delay the execution of the sentence unduly by saving exceptions at hearings on motions for a new trial and then taking the case, perhaps repeatedly, to the Supreme Judicial Court on appeal. There should be one appeal as of right in a capital case, but there need be no more. One convicted of murder must be given an opportunity to submit the record of the trial to the court of last resort and he is entitled to have that record scrutinized with the greatest care. If as a result of such scrutiny the court finds no error in the conduct of the trial, it would seem that the defendant should not have an unqualified right

thereafter to appeal from the decision on every eleventh hour application for a new trial. Such applications rarely have any merit whatever and seldom present any substantial question. In our opinion there should be no right of appeal at this juncture unless the appeal is allowed by a justice of the Supreme Judicial Court as presenting a new and substantial question which ought to be passed upon by the full court. It is now provided by statute (St. 1925, c. 279, § 3) that no capital case shall be taken up on a writ of error unless the writ is allowed by a justice of the Supreme Judicial Court, and we feel that there should be a similar requirement with respect to every attempted appeal after the original one.

The original appeal may well include, as of right, an appeal from the decision of the trial judge on a motion filed before the entry of the appeal in the higher court. This will cause no material delay in the disposition of the case. After the case is once entered in the Supreme Judicial Court, however, a different situation exists. We suggest the advisability of changing the law so that the whole case shall be regarded as transferred to that court and shall remain there until rescript, any motion with reference to it to be filed during that period in that court and to be dealt with by it unless that court, in its discretion, remits it to the trial judge for hearing and determination. If it is so remitted, or if any motion is filed in the Superior Court after rescript, the right of appeal should in our judgment be restricted as above stated.

4.

A single judge of the Superior Court now presides over murder trials and passes not only on questions of law involved in the trial of the indictment, but upon mixed questions of law and fact arising on motions for a new trial. The Supreme Judicial Court on appeal passes only on questions of law. As the verdict on such an indictment involves the issue of life and death, we think the responsibility too great to be thrown upon one man. If he errs in any matter of discretion as distinguished from law, the result is irreparable. Even if he is right, his decisions may be challenged, especially in a time of public excitement and there is no tribunal to establish the fact that he is right. It is vital that our Courts do justice; it is also vital that people know that they do justice.

While the Supreme Court may determine that, as matter of law, there was no evidence of guilt sufficient to warrant the submission of the case to the jury, yet if there was such evidence it is beyond the power of the Supreme Court to pass upon its weight and to hold that the verdict of the jury was not justified upon the facts.

It is true that the decisions of the trial judge upon matters of discretion,

may be reversed if there has been what is called an "abuse" of discretion, that is to say if "no conscientious judge acting intelligently could have honestly taken the view expressed by the trial judge." (See opinion of Wait, J., in Commonwealth *v.* Sacco, Mass. Adv. Sh. 1927, pp. 626–627.) It is needless to say that such an abuse will so rarely be found by the Supreme Court to have existed that there is no real appeal from that judicial act.

It follows that the final decision of many of the most important questions which arise in connection with a murder trial, as in other cases, is committed so far as the courts are concerned to a single judge of the Superior Court. An unjust decision by him upon such a question can be redressed by the governor and council alone, upon an application for a pardon or commutation of the sentence. The power of the executive to intervene in an appropriate case is highly important and should by no means be curtailed. The attempt to evoke its exercise is sure to be made, not infrequently, so long as it can be rightfully urged that important questions in the case have been passed upon only by a single judge. When the appeal to the governor is made, as matters now stand, there are bound to be cases where he will feel it necessary to make a thorough and painstaking investigation, either personally or through selected agents. In England, before the creation of the Court of Criminal Appeal, the Home Secretary, in whom is vested the executive power of clemency, occasionally found it advisable to have murder cases thoroughly investigated and reviewed, in his behalf, by one or more competent persons selected by him.

Such investigations by the executive, involving as they are apt to do something in the nature of a retrial of the case, are extremely burdensome, and in many ways objectionable. The occasion for them can be reduced to a minimum if we alter the system by which murder trials are presided over by a single judge and the appellate court passes only on questions of law. The necessary alteration can be made either by reverting to the old practice of having the trial of capital cases presided over by two or more judges, or by conferring greater powers and imposing more extended duties upon the Supreme Judicial Court, or by a combination of both these changes. We believe it to be inadvisable to restore the old practice of having more than one judge in murder trials, providing any different plan can be evolved which will be satisfactory. As matters stand it would interfere materially with the other work of the Superior Court if additional judges had to be assigned to murder cases. The practice of having more than one judge in such cases has been discarded practically everywhere, and is not an approved practice today. In our judgment

it would be distinctly preferable to have capital cases tried as at present but to broaden the functions of the Supreme Judicial Court on appeal so that it will pass upon the whole case, and will have power to order a new trial upon any ground if the interests of justice appear to require it. If the trial judge has ruled correctly on all matters of law it will of course be only in very rare instances that the appellate court will find anything in the case to warrant setting aside the verdict. But if that court has the duty of examining the evidence and the facts, and complete power to pass upon *all* the decisions of the trial judge, both at the trial and upon motions for a new trial, whether or not such decisions now rest within the discretion of the judge, it will be seldom indeed that there can be any occasion for a subsequent exhaustive review of the case by the governor.

The power which we suggest conferring upon the Supreme Judicial Court is the same as that now vested in the Court of Appeals of New York under a recent statute. Section 528 of the Code of Criminal Procedure reads as follows:

> When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below. (See Gilbert's Annotated N. Y. Criminal Code, pp. 414–418.)

In a recent case, People *v.* Ingraham, 232 N. Y. 245, the court said:

> Upon an appeal from a judgment of murder in the first degree we are called upon to review all the evidence and determine whether it is of such weight and sufficiency as to justify in our opinion the result which has been reached.

And in the later case of People *v.* Guadaguino, 233 N. Y. 344, the court said:

> In a case of murder in the first degree this court may order a new trial if it be satisfied that the verdict is against the weight of evidence or that justice requires a new trial.

In England by the Criminal Appeal Act of 1907 and in Scotland by the Criminal Appeal Act of 1926 similar broad powers of review are vested in the appellate court. (See also New Jersey, Compiled Statutes of 1910, pp. 1262–1263, §§ 136, 137, and Suppl. of 1924, p. 898, 53–137A.)

The English practice is interesting and important. The statute provides that a person convicted on indictment may appeal to the Court of Criminal Appeal, as of right, on any ground which involves a question of

law alone and that with the leave of the appellate court or upon the certificate of the trial judge may appeal on any ground which involves a question of fact or on any other ground which appears to the court to be sufficient. The statute then provides:

> The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

In Appendix A we reprint for convenient reference the account of the Court of Criminal Appeal which was given by Lord Hewart, the Lord Chief Justice of England, in an address delivered before the Canadian Bar Association on August 24, 1927.

A draft of an act to carry into effect all of our above recommendations appears in Appendix A, at page 77.

THE SUPREME JUDICIAL COURT.

Reference has already been made to the work of this court and to the great number of cases decided and opinions written during the past year. The problems of the court have been much considered at meetings of the council during the past twelve months, and certain members of the council have discussed the matter, at a lengthy conference, with four of the justices of the court. It is obvious that the court is much overworked. Not only has the number of cases increased considerably, but the increasing complexity of modern litigation and the constant growth and expansion of the body of the law as contained in statutes and in the decisions of the courts, with which they must keep in touch, adds much to the labors of the judges. In the year just closed the members of the court wrote more than 500 opinions. This is far in excess of what should be expected, or required, of them.

Where forty or fifty cases are argued or submitted on briefs in a single week, it is obvious that the decisions must be made under pressure and much responsibility reposed in the justice who prepares the opinion. While the Judicature Commission recommended, in 1921, that an appropriation be made for the purpose of printing advance copies of all opinions

and circulating them among the judges for examination and criticism before their adoption, as is done in the Supreme Court of the United States, we understand that the press of work is such that our judges have not the time to devote to such a consideration of the opinions of others but must content themselves in many cases with hearing them read in the consultations.

Furthermore the present arrangement of the sittings of the full court is not satisfactory. With only one sitting a year in the more distant counties and with the sessions in Boston all compressed into the period between the middle of October and the last of March, it results that a case tried in the lower court in Boston in January will rarely be argued in the Supreme Judicial Court until nine or ten months later, while as we have already pointed out in Bristol or Worcester or one of the western counties more than a year may well elapse between the trial of the case and the argument of the appeal.

There is a pressing need that arrangements be made (1) to relieve the pressure upon the justices of the court, so that they may cease to be overburdened and may give more thorough consideration to the cases before them than is now possible, and (2) to shorten the time between the entry and the decision of appealed cases.

With regard to these matters the Council has received during the year a great variety of suggestions which may be summarized as follows:

1. That an appellate division of the Superior Court, composed of three judges assigned from time to time by the Chief Justice, be created to hear appeals, either in all cases tried in that court or in certain classes of cases, with a more or less limited right of further appeal to the Supreme Judicial Court.

2. That a new intermediate court of appeal be created, to hear and decide cases tried in the Superior Court, the Land Court, the Probate Courts and the appellate divisions of the District Courts, with some kind of provision insuring that only the Supreme Judicial Court shall finally pass upon certain important classes of cases.

3. That the number of justices of the Supreme Judicial Court be increased.

4. That the single justice sessions of the court be abolished by taking away all nisi prius jurisdiction and leaving only the purely appellate work.

5. That concurrent jurisdiction of prerogative writs be conferred upon the Superior Court, with power vested in the Supreme Judicial Court to transfer such matters to the other court, like the power which it now has in suits in equity, the single justice session to be held only as needed and as directed by the Chief Justice.

6. That provision be made for occasional service by Superior Court judges in the Supreme Judicial Court, such service to be perhaps limited, as recommended by the Judicature Commission, to the single justice session.

7. That the full court sit in two divisions for the hearing of appeals.

8. That the practice of having five judges present at the sitting be changed

so that only four shall customarily sit, with perhaps the additional change that in certain classes of cases only three need concur in a judgment, so as to obviate the necessity if one dissents, of submitting the case on briefs to the other justices.

9. That the quorum of the court for the hearing of oral argument be changed to three instead of four justices, that oral arguments be taken stenographically; that they be written out *if desired*, that the opinion when prepared by the three justices be submitted with the record and briefs to all the other justices of the court so that every judge will have an opportunity to consider it with the opportunity of having the oral argument written out for consideration; that the present practice of having all cases decided by a majority of the full court be continued with the added assistance of the opinion of all seven justices instead of the present practice of decision by four or five without participation by the others; that the Chief Justice sit in all cases as at present; that counsel be required by rule to state on the first page of the brief the substance of the questions raised (as is done in Pennsylvania); that the opinions be printed and submitted to all the justices in proof sheets before they are handed down; that, in case of marked disagreement, among the justices after such consideration, the practice be adopted of ordering rearguments, before those justices who were not present at the first argument, or before the full court as seems best.

10. That the Supreme Judicial Court and the Superior Court be merged in a single court, with an appellate division designated from time to time by the Chief Justice.

11. That in certain classes of cases there be no absolute right of appeal to the Supreme Judicial Court (using the word "appeal" as including the taking of a case to the higher court on exceptions) but that an appeal be allowed only in the discretion of the trial court or upon leave obtained from the Supreme Judicial Court.

12. That an entry fee of $25, and perhaps also a bond to cover the costs of appeal, be required upon the entry of an appealed case in the Supreme Judicial Court.

13. That the power of the Superior Court to report cases without a decision be abolished.

14. That appeals on the facts in equity cases be abolished.

15. That the statutes with regard to rescripts and the publication of opinions be amended so that the court will no longer feel obliged to write an opinion in every case.

16. That, if the nisi prius work of the court be taken away, the sittings of the full bench be radically changed with respect to time, and somewhat changed as to place, to the end that cases may be more promptly heard and decided.

Most of these suggestions are worthy of very careful consideration. Some of them seem to us to be impracticable, at least under present conditions, while others we think should be put into effect as soon as possible. We proceed to consider them in order.

1, 2. The suggestion that an intermediate appellate court or division be created for the relief of the Supreme Judicial Court deserves and has received our most careful consideration. It may be that this will prove

to be the only solution of the difficulty. It is the method which was adopted in 1891 to relieve the pressure upon the Supreme Court of the United States, and it is the method which has been adopted in most of the larger states. We hope that it may not be necessary to take this step in Massachusetts. While the appellate divisions of the Municipal Court of the City of Boston and the other District Courts have proved most valuable and have completely justified their creation, the problem is very different in the Superior Court. If an appellate division of that Court were to be created, or an independent Appellate Court were to be established, it would obviously be necessary to provide that its decisions in most cases should be final, as otherwise we should have the admitted evil of successive appeals. If the decisions of the intermediate court or division were made final in many cases, presumably the opinions of that court would have to be published and we should thus have a second series of reports. Such an arrangement is not satisfactory and we think should be avoided except as a last resort. If there are other reasonable expedients, they should first be tried.

The disadvantages of intermediate appellate tribunals are pointed out in the careful study of their operation by Professor Sunderland, which we reprint in Appendix D, p. 114. Mr. McClennen also points out some of their disadvantages in the paper printed in Appendix D, p. 136.

3. We do not believe in increasing the number of justices of the Supreme Judicial Court.

In 1780, when the constitution was adopted the court consisted of five judges. The number varied from time to time until 1873 when it was increased to seven, and the court has ever since been thus constituted. We concur in the view expressed by the Judicature Commission, in its second report (p. 58), as follows:

> The court has stood as a small court for over one hundred and forty years, and as such, with the longest continuous existence of any court in the country, it has acquired a deep-seated respect and prestige in the minds of the people of Massachusetts, which we believe to be one of the greatest elements of strength and value in the government of the Commonwealth in the interests of all the people. We believe it would be a serious mistake to enlarge the number of this court.

Apart from the important consideration thus stated we feel that if certain other changes are brought about the court can perform its judicial duties more efficiently and satisfactorily with seven judges than with a larger number. It should also be noted that the addition of even one judge to this court would increase the majority needed to decide cases from four to five if the traditional practice of decisions by a majority of

the full court is to be continued. This would require the constant sitting of at least five judges if all who are to take part in the decision are to hear the oral argument.

4, 5. The withdrawal from the Supreme Judicial Court of its nisi prius jurisdiction would furnish a real measure of relief. We are told that this would in effect be equivalent to the addition of one judge for the appellate work of the court. The argument against it is based on two considerations, — (1) that it is advantageous to the judges themselves to keep in touch to some extent with the actual trial of questions of fact, and to preserve a closer contact with the bar and with the people than is incidental to appellate work; and (2) that in important cases, falling within the classes of which the court now has nisi prius jurisdiction, it is a satisfaction to lawyers and their clients to have the cases dealt with by a judge of the highest court. On the other side it is urged that, without minimizing the importance of these considerations, it is a condition and not a theory that confronts us; that the matter is of real importance only in Suffolk County; that the judges simply have not the time for nisi prius work, if they are to keep up the standard of appellate work which must be done and can be done by no other court; and that to require nisi prius work of judges of a court of last resort is not in accord with modern practice. It is pointed out also that under the power which they now have the judges feel compelled either to transfer equity suits to the Superior Court, or to refer to masters those which they do not transfer; and that the prerogative writs, with which they are largely occupied, do not ordinarily present questions of great importance.

As long ago as 1910 the Commission on Causes of Delay in the Administration of Justice said: "The better to insure the maintenance of the prestige of the Supreme Judicial Court and the high standing of its decisions wherever the common law is known, we believe that legislative changes affecting it should tend to relieve it more and more of all but its appellate jurisdiction."

We understand that the present justices of the court are unanimous in feeling that the single justice sessions should be abolished.

If the Superior Court were to be given concurrent jurisdiction of prerogative writs, with power in the Supreme Judicial Court to transfer such writs to the Superior Court for trial, it is safe to say that transfers would be made with the same regularity as is now the practice in equity suits, and that only a shadow of the advantages, such as they are, of the present system would be retained.

So far as concerns writs of mandamus, prohibition or certiorari directed to a lower court, these would naturally be dealt with by the full bench.

Such writs fall within the original supervisory jurisdiction of a court of last resort, and, like other writs customarily issued by appellate courts of last resort, would continue to be issued by the Supreme Judicial Court.

After much consideration and discussion, a majority of the council (Mr. Mansfield dissenting and Judge Corbett reserving his right to dissent) recommend the immediate passage of legislation relieving the Supreme Judicial Court of all nisi prius jurisdiction except admission to the bar, and disbarment or other discipline of attorneys. Mr. Mansfield's reasons for dissent are stated below.

6. If the present statutory single justice sessions be abolished we see no need of providing for the occasional service of Superior Court judges in the Supreme Judicial Court, and we do not pause to consider the possible constitutional difficulties in the way of such service with the full court. If the single justice sessions be retained, we think it may be advisable to enact legislation enabling the Chief Justice of the Supreme Judicial Court, in consultation with the Chief Justice of the Superior Court, to assign a judge of the latter court, if occasion requires, to hold that session. A recommendation to this effect was made by the Judicature Commission in its second report (pp. 60–61). The objection to this plan is that it would interfere with the assignments in the Superior Court which would be unfortunate.

Frederick W. Mansfield's Dissent on the Question of abolishing the Single Justice Sittings of the Supreme Judicial Court.

I regret that I cannot concur with my colleagues in their recommendation that the Single Justice Sittings of the Supreme Judicial Court be abolished. I agree that the Supreme Judicial Court is overpressed with appellate work. I agree too that it ought to be relieved. But I do not agree that abolition of the single justice sittings is the best or wisest way to give that relief, and for the following reasons:

The abolition of this sitting would be wholly inadequate to afford any considerable measure of relief. The Supreme Judicial Court is forced by pressure of increasing business to write about twice as many opinions yearly as it comfortably and efficiently can. If this is so then its work ought to be cut in half or else its man power ought to be doubled. But abolishing the single justice sittings would not double it. It would not even mean the addition of one judge to the appellate court work. If the judge holding these sessions were compelled to give all his time to them then it is plain that abolition of the sessions would release that judge to Full Court work. Then it could be truly said that such abolition would in effect add one judge to the other six engaged in that work. But the judge holding this session does not give all his time to it — nor anywhere near all his time. During the year 1926 the total time spent on the bench by the single judge was about 250 hours. This was an average of about 5 hours a week. Such sittings are held on Tuesdays and Fridays of each week except in summer when the sit-

7, 8. The proposal that the court sit in two divisions, and the similar proposal that only four judges sit for the hearing of arguments, seem to us to be not wholly devoid of merit. It is believed by many that the ideal appellate court consists of three judges. The United States Circuit Courts of Appeal, as well as the divisions of the English Court of Appeal, are so constituted. The latter court sits in two divisions, and we understand that owing to press of business the Judicial Committee of the Privy Council has recently been similarly divided. The Supreme Court of the state of Washington consists of nine judges and we are informed that it sits in two divisions of five each, the chief justice presiding in both divisions but writing only half as many opinions as each of the other judges. We are not prepared, however, to recommend the adoption of any such plan in Massachusetts at the present time. Our people have become accustomed to decisions by a full court in which a majority of the entire court concurs. We do not believe they would be satisfied with decisions which might be rendered by two out of three, or even by three out of four. We think it likely that any such arrangement would materially impair the prestige of the court and of its judgments.

9. We do not believe in any change which lessens the importance of oral arguments. The submission of cases which have been thus argued to the decision of seven judges of whom a majority were not present at

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tings are held once a week. Thus it is apparent that the judge sits about 2½ hours on each Tuesday and the same on each Friday. The remainder of his time may be and is devoted to Full Court work unless he is compelled to devote some time in chambers to matters that have come up at these sittings. But at the present time not many matters requiring work in chambers come up at these sittings. It is now the prevailing custom under St. 1922, c. 532, to transfer equity matters to the Superior Court, or if they are not so transferred to send them to masters to take the evidence. Practically only work arising under special statutes and the so-called prerogative writs are now dealt with by the single justice. These writs are Habeas Corpus, Mandamus, Quo Warranto, Audita Querela and Certiorari. The fourth is rarely resorted to, the third seldom, and the last more frequently but not very frequently. Habeas Corpus and Mandamus cases then are the chief source of business for this session and I am not ready to say that they should be taken away and transferred to the Superior Court. That court is already crowded if not overcrowded with work. We say so in another part of this report — indeed we refer to it as the "Problem" of the Superior Court. I submit that loading more work now done by the single justice of the Supreme Judicial Court upon the Superior Court is not the way to solve the Superior Court "Problem." It only complicates it and makes it more difficult of solution. Nor do I think it wise public policy to sequester our Supreme Judicial Court too much. At present the only point of contact between our Supreme Court and the people, and the bar, is the single justice sitting. That point of contact ought to be retained. I

the arguments seems to us (with one member of the Council dissenting) to be highly objectionable.

10. We do not favor the consolidation of the Supreme Judicial Court and the Superior Court. We have not yet been able to perceive any material advantages which would result from the unification of these two courts. At all events we believe it would be most unfortunate to sacrifice the prestige and standing of our historic, small and separate court of last resort by substituting for it a mere appellate division of a large trial court.

11. The suggestion that in certain classes of cases there be no absolute right of appeal to the Supreme Judicial Court, but that it be made necessary to obtain leave to appeal, on application either to the trial court or to the Supreme Judicial Court, is perhaps based on the fact that so many classes of cases can be taken from the Circuit Courts of Appeals to the Supreme Court of the United States only if the latter court, in its discretion, grants a writ of certiorari.

The suggestion that this principle be applied to appeals from a trial court is a good deal of a novelty. It is true that in England there can be no appeal from the certain orders or judgments of the trial court to the Court of Appeal without the leave of one or the other of the courts, but these are, in the main, merely certain kinds of interlocutory orders or

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think that the people and the bar like to know and to see our Supreme Court Judges. The people get very little opportunity to do so at Full Court sittings. And I doubt if it is scientifically sound to try to stem the tide of litigation flowing to our Supreme Judicial Court by forcing it into some other channel. Eventually it will reach the Supreme Judicial Court by appeal in many cases. But this has been the custom in Massachusetts for many years. Whenever increased business has become pressing we have usually tried to relieve that pressure not by checking litigation at its source — but by side-tracking it. Our Supreme Judicial Court used to be a great trial court but we have been steadily whittling away the work that it used to do. For example —

In 1883 the Superior Court was given concurrent equity jurisdiction with the Supreme Judicial Court.

In 1887 jurisdiction in divorce cases was taken from the Supreme Judicial Court and given to the Superior Court.

In 1891 jurisdiction in capital cases was taken from the Supreme Judicial Court and given to the Superior Court.

In 1905 jurisdiction in contract cases was taken from the Supreme Judicial Court and given to the Superior Court.

In 1919 the right of appeal to a single justice from a decree in probate was taken away; probate appeals on questions of law now being made directly to the full court; and there being no longer an appeal from the Probate Court on questions of fact.

judgments. (See Supreme Court of Judicature (Consolidation) Act 1925, section 31.) It seems to us that in Massachusetts there are few, if any, kinds of cases in which the absolute right of appeal from the trial court should be restricted.

It may be, however, that the decisions in certain classes of matters where the trial judge has a large measure of discretion and his decisions are rarely reversed, might perhaps be made final unless leave to appeal is obtained. We have in mind, for instance, the decisions of the Probate Court on motions for jury issues in will cases. It is well known that it is only rarely that the Supreme Judicial Court reverses the Probate Court in a matter of this kind, and we think that no injustice would result from requiring that a party desiring to appeal should be obliged to obtain the leave of the higher court, to be applied for on motion supported by written argument. There are perhaps other matters which can properly be treated in the same way.

The considerations which lead us to oppose any restriction upon the right of appeal from the trial courts in ordinary cases have no application to appeals from the appellate divisions of the Municipal Court of the City of Boston and the other district courts. Where a litigant has prosecuted one appeal to an appellate court there seems to be no reason why he should be permitted to appeal to still another court unless leave is granted by the

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In capital cases, beginning in 1804 and down to Chapter 232 of the Acts of 1872, the full (Supreme) court presided at a trial before a jury. By that statute it was provided that two or more justices of the Supreme Judicial Court should preside.

In 1922 (c. 532) Supreme Court justices were authorized to transfer equity cases to the Superior and Probate Courts.

It is argued that there is so little left now of that work for the single justice that it is hardly worth while to retain this sitting any longer. But after whittling away almost to the vanishing point the very considerable work that this court used to do, it is hardly fair then to argue that there is so little left that that also ought to be taken away. And if there is so little left that it is hardly worth while to retain these sittings, then it must be true that the time saved to the Full Court by taking that little away would also hardly be worth while.

It seems to me also, that in our zealous efforts to speed up the work in the Superior Court we may have lost sight of the effect upon the Supreme Judicial Court. We have increased the number of judges in our Superior Court to keep abreast of increased business. Cases are being tried more speedily in that court. The inevitable result is that appellate work in the Supreme Judicial Court has also increased. All appellate work must flow through the Supreme Judicial Court. With acceleration of trials in the Superior Court that flow of appellate work has increased. But the Supreme Court has not been provided with means to cope with this increased flow. We have enlarged the bottle but not the neck of the

higher court. Upon this subject we have no hesitation in renewing our recommendation of last year (Second Report, p. 59).

12. One way of relieving the Supreme Judicial Court of some of its work is by increasing the expense of an appeal, and perhaps by requiring a bond for costs. In the federal courts there can be no appeal to the Circuit Court of Appeals unless a bond for costs, ordinarily in the sum of $250, is filed; and, indeed a defendant against whom a judgment has been obtained cannot stay its execution unless he files a bond covering the full amount of the judgment. We do not know that it has ever been urged that such a supersedeas bond should be required in the state courts. At all events we are far from recommending it. As to whether the filing of a bond for costs should be made a condition precedent to the perfecting of an appeal (in all cases except those in which it appears that the appellant is financially unable to furnish such a bond) we have come to no conclusion, and prefer to withhold further consideration of the matter until we are able to deal with the entire subject of costs.

So far as the entry fee in appealed cases is concerned we feel that it should be left unchanged at present for reasons stated in our Second Report (p. 53).

13. Where a case is reported to the Supreme Judicial Court without a decision below, or with only a pro forma decision, the highest court of the state is in effect converted into a court of first instance. That this should ever be possible is a most unusual condition of affairs, perhaps originating in a rather illogical extension to other courts of the power of a single justice of the Supreme Judicial Court to reserve cases for the consideration of the full court.

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bottle. How best to enlarge it is not an easy problem. We have not approved of the proposal to increase the number of judges in the Supreme Judicial Court from 7 to 9. I agree with my brethren as to that proposal. But I am not certain that that may not be the only solution of the problem. Either that or creating an intermediate appellate court — which I strongly oppose; or it may be necessary to take all traffic and automobile cases out of the courts, as was done in the Industrial Accident cases. But I am satisfied that the very slight relief that might be afforded to the Supreme Judicial Court by abolishing the single justice sitting would be negligible and, if done, would still leave the problem unsolved. It would be only a nibble when the situation calls for a large bite.

And I very much fear that any slight gain thus attained would be more than offset by the far-reaching and, perhaps, adverse effects that might flow from the shattering of a tradition that the judges of our highest court have always been available to guard the rights of our citizens. I think it might be unwise to withdraw our Supreme Judicial Court too far from the trial bar and the people.

FREDERICK W. MANSFIELD.

Under G. L., c. 214, § 31, a judge of the Superior Court who hears a suit in equity may actually report the evidence to the full court, as well as all questions of law arising in the case, without making even any findings of fact; and the Probate Courts have the same power under G. L., c. 215, § 13. For an instance of this sort of report from the Superior Court see *Furber* v. *Dane*, 203 Mass. 108 (where, however, there was an agreement as to *some* of the facts). This is a practice which ought not to be tolerated.

So also, by virtue of G. L., c. 231, § 111, the Superior Court may report a case without a decision where there is an agreement as to all the material facts.

We think that all these statutory provisions should be repealed, and that in all cases there should be a real decision in the Superior Court or the Probate Court (as is now required in the Land Court, G. L., c. 185, § 15) before the case can be reported. The requirement that there be a real decision by the trial court would undoubtedly lead, in some cases, to the acceptance of the decision by the parties, and would thus to some extent relieve the Supreme Judicial Court.

What we have said is we think subject to one qualification. Where a case under the Workmen's Compensation Law (G. L., c. 152) comes to the Superior Court there has already been a decision, as to both facts and law, by a quasi-judicial tribunal, the Industrial Accident Board, and if the Superior Court were permitted to report such a case to the full bench without a decision, the Supreme Judicial Court would not in any real sense be converted into a court of first instance. It was on the strength of this reasoning that we recommended last year that the Superior Court be given this power. (Second Report, pp. 61–62.)

14. We see no reason for abolishing the appeal on the facts in equity cases. The firmly established, historic power of appellate courts to deal with the facts in such cases is not exercised to reverse findings made on oral testimony except in that small minority of cases in which it is felt that the judge below was clearly wrong. We think the power to correct such errors should continue to exist.

15. We understand that the justices of the Supreme Judicial Court feel that the statutes with respect to rescripts and the publication of opinions require them to write an opinion in every case, though it may at times be a very short one. There is a widespread feeling at the bar, with which we sympathize, that there are many cases which might be disposed of by memorandum decisions embodying only the rescript, and that much of the time of the judges could be saved and the number of volumes of the printed reports be lessened, if, in accordance with the practice of the United States Supreme Court and other courts, such memorandum decisions were

frequently handed down and were printed at the end of each volume. To make this entirely possible only a very minor amendment of the statutes is required. We advise such an amendment and submit a draft in Appendix A.

16. The Supreme Judicial Court for the Commonwealth now sits in Boston an aggregate of twelve or thirteen weeks between the middle of October and the last of March, to hear cases from the counties of Suffolk, Essex, Middlesex, Norfolk, Plymouth and Barnstable. Cases from the other counties are heard at sittings held in western Massachusetts, in Worcester and in Taunton in September and October, such sittings occupying only a few days. As we have pointed out above, in many of the counties it may well be a year or more after a trial in the Superior Court before the case can be argued in the Supreme Judicial Court, and in Suffolk and the other counties from which cases are argued in Boston there is no assurance that any case tried after say January 1st can be argued before October or November.

These delays are in part due, in actions at law, to the time necessarily consumed by counsel in the endeavor to state the evidence in narrative form for the purposes of the bill of exceptions. With respect to this matter as already stated we repeat our recommendation of last year (Second Report, pp. 35–37) that the excepting party be permitted to include in his bill of exceptions a transcript of the testimony exactly as given, omitting such portions as both parties agree to be immaterial or as the trial judge directs to be omitted. It may be advisable to go further and extend to certain classes of civil cases the method of appeal on the stenographer's transcript of the testimony now obtaining in certain criminal cases under St. 1925, c. 279, and St. 1926, c. 329. Changes such as these will materially expedite the entry of cases in the Supreme Judicial Court.

In order further to expedite the hearing and decision of cases of all kinds, and at the same time to spread the work of the court more uniformly over the year, we recommend that, if the single justice sessions are abolished, the time of the present sittings of the court be radically changed, and that the court sit only in Boston unless it shall, in its discretion, deem it advisable to hold a sitting occasionally elsewhere. As already stated we believe from inquiries we have made, that there is a growing feeling among lawyers in the more distant parts of the state that the opportunity of presenting their cases in Boston on assigned days at several different times during the year, instead of being confined to a single sitting at their county seat, will more than counterbalance the disadvantages incident to the necessary travel.

We believe it would be very advantageous if the court should sit, at Boston, the first two weeks, more or less, of each month from October to May, inclusive, (with power to sit elsewhere at times if it should deem it advisable), and that on certain designated days, perhaps every other month, cases from the more distant counties should be especially assigned for argument. We think it very desirable that the sitting of each day be shortened if possible.

In order to carry out these suggestions it is highly desirable, if not absolutely necessary, that the judges be furnished with better accommodations for their work in Boston. Their quarters are now entirely inadequate. Each judge should obviously have a private room, with a law library conveniently accessible. This is in the public interest. One has only to visit the states in our immediate vicinity and observe the manner in which their supreme courts are housed to appreciate the unsatisfactory conditions which now exist in Massachusetts.

To sum up — there are certain essentials to the better administration of justice by the Supreme Judicial Court as the final court of appeal.

I. Getting the cases more quickly on the docket of the full court. To secure this it is essential either that the practice of bringing the case up on the stenographer's transcript, as is now done in capital and some other criminal cases, should be extended to all civil cases or at least that the substitution of the stenographic report of the evidence for the "summary" statement now required by law (as recommended in our second annual report) should be adopted.

II. Getting such cases from all counties heard sooner (than now) after they are on the docket. To secure this it is essential that the full court should sit for all the counties in the Commonwealth every month of the year except in the summer.

III. Shorter arguments. The cutting down of arguments to one-half an hour according to the practice adopted last year is seemingly a great success. Requiring the main points of the case to be stated in comparatively few lines on the first page of the brief (as is required in Pennsylvania) is another step which should in our opinion be adopted.

IV. Ample time for the close study of facts shown by the record in complicated cases and for the extended scope of appeals in capital cases which we have recommended.

V. More exhaustive consideration of opinions by all the sitting judges in cases calling for the writing of opinions, and disposing of cases by memorandum only, when the law applied is settled and there is nothing novel in the application of it.

The first can be secured only by circulating the opinions in proof among the sitting judges before they are finally presented for adoption. In cases where there is a difference of opinion at the outset or where a difference develops later on we understand that full and exhaustive consideration by all the sitting justices is obtained now by the present practice of the writing of memoranda (quite as exhaustive as the draft opinion itself) which are circulated with the draft opinion among all the justices who are to join in the decision. It is in cases involving important principles of law that more exhaustive consideration ought to be had as to the contents of the opinions, although there may be agreement as to the result to be reached. One reason for this is explained on page 66 of the Final Report of the Judicature Commission.

Disposing of many cases by memorandum as above suggested and the circulation of opinions in proof go together. The time saved by the first of the two will seemingly give the court the additional time required for the second.

VI. There are two important steps without which it is difficult to try to secure those stated above.

(1) "The increasing complexity of modern litigation and the constant growth and expansion of the body of the law as contained in statutes and in the decisions of the courts" (which we have spoken of already) have brought with them the necessity of a complete change in the methods which must be adopted to secure an efficient administration of justice by the courts, and especially by courts of final appeal. Since the latter part of the 19th century the bar has found it necessary to revolutionize the method of carrying on their law offices. This change in conditions requires — no weaker word is adequate — requires a similar change in the organization and equipment of courts of final appeal. The difference is that the bar are their own masters while the courts cannot effect the necessary changes until the public and the Legislature recognize the necessity of them and give the courts the means of adopting the organization and equipment which modern conditions make necessary.

Under present conditions each judge of the Supreme Judicial Court should have a separate room with ready access to a good law library. A few years ago what was then a useful working library was bequeathed to the court, but it has not been able to make due use of it for lack of adequate room for it in the Suffolk County Court House.

The necessity — the absolute necessity — of adequate quarters for the Supreme Judicial Court cannot be overstated. It would be just as reasonable to expect a joiner to do good work with antiquated tools which he is not allowed to keep sharp as it is to expect the final appellate court of the

Commonwealth to give to the public a good administration of the law under the conditions existing in the Suffolk County Court House.

(2) The second important step toward a better administration of law by the Supreme Judicial Court as the final court of appeals is (in the opinion of a majority of us) the abolishing of single justice sessions. That would give what the majority of us believe to be roughly the equivalent of an additional judge without increasing the number of the justices.

The changes which we have just discussed are not the only changes which could be adopted to secure a more efficient administration by the full court. We have discussed some other changes which might well be adopted also, but these — one in the opinion of all, and the other in the opinion of a majority, of us — are of special importance.

THE PROPOSAL TO REPEAL SECTION 81 OF CHAPTER 231 OF THE GENERAL LAWS.

As already stated on page 26 of this report, a majority of the council (Mr. Mansfield dissenting and Judge Prest reserving his right to dissent) recommends the repeal of § 81 of c. 231 of the General Laws. Mr. Mansfield's reasons for dissent will be found below. The Judicature Commission also made this recommendation in its final report of 1921. (H. 1205 of 1921, pp. 85–89.) Your Excellency made a similar recommendation in your inaugural address to the legislature in 1927 and Attorney General Benton made a similar recommendation in his annual report in 1927.

Section 81 of chapter 231 of the General Laws provides that —

> The courts shall not charge juries with respect to matters of fact, but they may state the testimony and the law.

Of course, it is not the function of a judge to "charge," in the sense of dictating to a jury, what verdict they shall render on the facts and evidence. The statute goes far beyond this, however, and forbids the judge from expressing any opinion whatever about the facts, even though he makes it perfectly plain to the jury that they are not in any way bound to follow his opinion.

Mr. Mansfield's Dissent on the Proposal to Repeal Section 81 of Chapter 231 of the General Laws.

I know it is fashionable whenever lawyers congregate, and among whom are leaders of the Bar, to advocate the repeal of our statute which prohibits judges charging on the facts but I have very grave doubts as to the wisdom of such a change. This statutory prohibition has been law in Massachusetts since 1860. If judges are to be entrusted with the power and the duty to charge juries on the

As stated by the Judicature Commission, the relations of judge and jury are generally talked about in terms of the power of the judge, but they involve broader questions.

A majority of the council believes that as time goes on it is more and more important to honest, poor litigants who can not, or do not, have as shrewd, able, and skilful lawyers as their opponents, that there should be a competent unmuzzled judge on the bench whose sole duty is to do his best to see that justice is done impartially. This is our understanding of the common law function of a judge in accordance with the best traditions of the profession and of the public service.

The effect of the repeal which the majority recommend, would be to give the jury in its consideration of the case the assistance, not only of the court's explanation of the law, but also of the free discussion and sometimes the opinion of the court about the facts, and the evidence, in those cases, sometimes of a complicated character, in which the court felt that such an opinion might be of assistance to the jury. The same jurymen who are called to serve in the Federal courts, in the Post Office Building in Boston, receive such assistance, but when they are called to

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facts and to state their opinions upon the evidence we should have a specially trained corps of judges. And even if the judges were specially qualified for this duty I would still be doubtful about the wisdom of such a change. Undoubtedly every jury would be strongly influenced by the views of the judge. I am not impressed by the observation that American juries can be trusted to disagree with the judge if they think he is wrong. To advance this unsupported prophecy as a reason for clothing judges with that power seems to me utterly fallacious; because it is plain that the purpose of granting judges this power is that the judge may dominate the trial and induce the jury to agree with him in his opinion. To say that jurors could be safely trusted not to do so, and that they would not do so in proper cases, plainly shows that there is no necessity for changing the law. That is what juries do now — they decide cases independently of the judge. This proposed legislation, seems to me directly to affect our jury system. I think the plain effect of its adoption would be a gradual constriction of the right to trial by jury; and if that right is gradually nibbled at here and there it will eventually disappear. I do not know whether there are any guiding statistics indicating how frequently in England and America juries have arrived at independent verdicts contrary to the way pointed out to them by the judge that they should go; but I venture to say that the percentage is very small and that in at least 95 per cent of the cases the juries have adopted the judge's views. If I am right about this then where is the sense in retaining the jury system any longer in jurisdictions that follow this custom? It would be just as well to waive the jury and try before the judge alone, and perhaps this is the ultimate result which many of the advocates of this custom desire.

It is suggested that in the United States Courts this power is not often exercised and that it would be only "occasionally" that our judges would feel moved

serve in the state courts the present statute assumes that they are not intelligent or strong enough to listen to a judge's free discussion, or opinion on the facts or the evidence, and disagree with him if they think he is wrong. Chief Justice Taney of the Supreme Court of the United States in Mitchell *v.* Harmony, 13 Howard, 420, pointed out that respect for the jury system was based on the assumption that American juries have that amount of intelligence and independence. Prior to 1860, the statutes of Massachusetts assumed that Massachusetts jurymen had that amount of intelligence and independence.

Jurymen are drafted from their private affairs, often at serious loss to themselves. If called upon to decide any important and difficult question outside of a court room, we believe that practical men would expect to hear what a trained man, specially employed to sit with them and listen to a case fairly, thought about it in order that they might consider his views before making up their own minds. We do not see why men should not have the same assistance inside of a court room. The question seems to us one upon which the judgment of the laymen of the community, who serve on juries, is likely to be as good, if not better, than that

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to comment on the evidence. If this is so I cannot understand why it is urged as a reason for favoring such legislation. It seems to me to indicate that there is no need whatever for it; for if the occasions for its use are infrequent how can it be urged that there is a public necessity for it? On those few occasions when juries may be misled the judge can always prevent injustice by setting aside the verdict and ordering a new trial; and I suspect that is what he would be strongly inclined to do if a jury decided a cause contrary to his views, if he had the power of expressing them to the jury.

And I am not impressed by the argument that under our present law the judge is "muzzled". He has a right to comment on the testimony even now and as a practical matter it is usually a very dull judge who cannot, and does not, intimate to the jury what his opinion is of the evidence. But whether the judge is muzzled or not under the present law I very much fear if it is changed that the result will be to take the muzzle off the judge and put it on the jury.

Nor am I at all satisfied that the judges themselves would be in favor of this measure. I think I could name several who believe that the present law is good and who get great help from their juries in deciding questions of fact. And not only is the attitude of the judges uncertain but the opinion of the trial bar upon this question is very largely unknown. It may be that most of the lawyers who favor the change are those who would not claim a jury trial in any event, and I am disposed to doubt that lawyers who thoroughly believe in the right to trial by jury are favorably inclined to the change. For this reason I doubt that the Judicial Council is reflecting the opinion of the trial bar of Massachusetts in its recommendation. Some method ought to be devised to take this opinion before such legislation is considered.

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of lawyers. Of course, it is the duty of a judge in expressing any opinion on the facts and the evidence, to explain to the jury that what he says is merely for their assistance for what it is worth and that it is their responsibility to make up their own minds about those questions.

There is much misunderstanding about this matter. In the ordinary case, where there is a reasonable doubt as to the proper conclusions to be drawn from the evidence and there are no special circumstances which may lead the jury into error, the judge would not feel called upon to express any opinion upon the facts. One could attend the trials of many cases in the Federal courts without hearing the judge on a single occasion comment on the facts in a way that would be improper under our present state practice. Occasionally, however, there is a case where, either from the nature of the issues or from the marked disparity in the ability of counsel, the jury is likely to be misled and would be much aided in arriving at a just verdict by wise and impartial comment on the evidence by the trained magistrate on the bench.

The suggestion that the recommendation to repeal the statutory restriction would tend toward abolishing, or weakening, or "nibbling" at the jury system, seems to us a mistaken view. The question is not whether we shall abolish or weaken the jury system. The jury system is too strongly planted in our government and in the minds of our citizens for any critics to disturb it. The real question is — what *is* the jury system contemplated by our constitution? Is it what it was in Massachusetts before 1860, and what it is to-day, and always has been, in the Federal courts since 1789 or not?

In U. S. *v.* Phil. and Reading R.R. Co., 123 U. S. 113, 114 (1887), the Supreme Court of the United States said:

> Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination. (See also Capital Traction Co. *v.* Hof, 174 U. S. 1.)

The late James B. Thayer, who was one of the leading authorities upon the history of jury trial, said:

> It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words.

It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern and much less to be respected. (Preliminary Treatise on Evidence at the Common Law, 188 and 189, note.)

We do not believe that Massachusetts jurors are so docile and so lacking in intelligence that they will follow a judge's opinion on the facts if it is not in accord with their own views. In the Stuart period in English history it was shown that juries could not be dominated by the subservient political judges of those days, even though subject to penalties for not agreeing with them. Under the conditions of today the danger of domination by the judge has been reduced to the vanishing point.

The right to jury trial, guaranteed by our Constitution, contemplates a trial before citizens of the same vigorous intelligence as of old, who can be trusted to listen to the judge's views if he feels that the case calls for a statement of them, and at the same time to follow his direction that they must make up their own minds and that it is their own judgment which is to govern. If it is not true that juries have this independence today, then the character and intelligence of our people have indeed deteriorated. We believe that the statute of 1860 is a reflection upon the brains, courage and good sense of those of our people who are subject to jury duty, and that it should be repealed. It should not be left to partisan lawyers alone to deal with the facts, especially as the skill of one may greatly outweigh that of his opponent. The jury should have *all* the assistance in arriving at a just verdict which may be given them by the only trained and impartial mind participating in the trial.

For these reasons the majority of the Council recommend the repeal of section 81 of chapter 231 of the General Laws.

THE TRIAL OF EQUITY SUITS IN MASSACHUSETTS.

The congestion of business in our trial courts has led to one result which is very unfortunate and is eliciting more and more outspoken criticism. It has become practically impossible, at least in Suffolk County and probably in the other counties as well, to secure a trial of an important equity case before a judge. If any suit in equity is begun in the Supreme Judicial Court it is almost always either transferred to the Superior Court or sent to a master. In the Superior Court in Boston the merit session is occupied principally with the simpler cases which can be quickly disposed of and the "heavy" cases are referred to a master. If counsel announce in advance that any substantial length of time will be required for the trial, the chance is strong that the judge will decline to hear it and will insist on a reference, believing that he will be better and more appropriately

occupied in hearing several simpler and shorter cases. The reference to a master is often against the wishes of one or both of the parties, and practically always involves both of them in much greater expense.

The situation would not be so regrettable if it were not for the fact that the court practically always declines to require or permit the master to file a transcript of the evidence with his report. The master's findings thus become conclusive and the court ceases to concern itself with the propriety of the decision upon all questions of fact, although they are of course likely to be the vital questions in the case. This is the more unfortunate as such cases are not infrequently referred to a master, chosen by the court, in whose ability the parties may not have the fullest confidence.

Where equity cases are tried in court, an appeal lies, on the facts, to the Supreme Judicial Court. The result of our present methods is that the latter court must concern itself with the correctness of findings of fact in less important cases, while in more important cases there is no opportunity to have the findings of fact examined by any judge of either court. More than this, an equity case which is referred to a master may present the question whether the evidence, as matter of law, justifies a particular finding. This is a question of law, and yet it is one which can not be submitted to any court. The master's decision is final. Even if the rule to the master requires him to report so much of the evidence as is necessary to present any point of law raised by either of the parties, it has been held that a request for a ruling by the master that on all the evidence a particular finding is not warranted can not justify a report of the evidence to the court (Smith *v.* Lloyd, 224 Mass. 173).

From the point of view of the judges the reason for all this is plain. They feel that amidst all their other duties they have not the time to concern themselves with the evidence taken before the master and with his findings of fact. They are compelled thus to abdicate an important judicial function, to an extent which we believe to be most unusual. We can not think that this method of dealing with important equity cases prevails generally in this country.

We are planning to consider this whole subject during the coming year in connection with other problems of the Superior Court.

In this connection it appears, from figures which have been furnished us, that during the calendar year 1926 cases were referred to masters and auditors in the various counties as follows:

Counties.	Master.	Auditor.
Barnstable	5	10
Berkshire	12	2
Bristol	51	25
Dukes	–	–
Essex	62	44
Franklin	22	11
Hampden	88	55
Hampshire	10	14
Middlesex	89	59
Nantucket	–	–
Norfolk	17	9
Plymouth	34	19
Suffolk	222	152
Worcester	82	52
	694	452

The total cost to all the counties for masters and auditors in 1926 was $163,685.57, as already pointed out.

In connection with the foregoing discussion, we call attention to one suggestion which deserves serious consideration, *i.e.*, that an act should be passed giving a judge who has reached a certain age after a fixed period of service the option of retiring from a full-paid position to a position of part-time service with the judicial salary adjusted to 60% of the salary of a full-time judge.

Under such a provision those of the older judges who find themselves overburdened by the strain of jury trials and the necessity of traveling about the State could undertake work which, while equally important, would involve less time and effort. Such part-time judges could undoubtedly hear some of the cases which are now referred to masters.

Since 1919 the statutes of Connecticut have provided that "Each judge of the Supreme Court of Errors and of the Superior Court, upon attaining the age of seventy years shall be a state referee during the remainder of his life, and when appointed may hear and report cases to the Superior Court and each such judge shall receive annually as compensation" an amount which is fixed by chapter 274 of the Public Acts of 1927 at $7,000, provided the judge has served continuously twenty years on some court. We understand that much of the work which is here done

by masters and auditors is done in Connecticut by these older judges as State referees.

While we have not yet formulated it in a definite recommendation, we feel that the suggestion should be mentioned now for general consideration in connection with the subject of masters and auditors.

It should be noted that this is not suggested as a "pension" plan, but as a practical measure of utilizing the services of judges to the extent of their strength for the more effective handling of some of the work of the court that is now sent to masters and auditors and which we believe should be done by judges.

Equity Appeals.

By St. 1918, c. 257, § 432, the common law appeal was for the first time made applicable to equity cases. This provision now appears in G. L., c. 231, §§ 144 and 96. This extension of the common law appeal was really unnecessary because it added nothing substantial to existing rights by way of appeals in equity; nor does it serve convenience, as by Robinson *v.* Donaldson, 251 Mass. 334–336, an appellant from a final decree may waive a report of the evidence and go up on the bare record. The extension of this common law appeal to equity cases attracted little attention until the decision in Sullivan *v.* Roche, 1926, Adv. Sheets 1737, where it was expressly recognized.

We are informed by an experienced equity judge of the Superior Court that this form of appeal, thus recognized, defeats the purpose of § 25A of chapter 214 of the General Laws which was inserted on recommendation of the Judicial Council by St. 1926, c. 177. That section allowed the entry of a final decree in equity notwithstanding the fact that exceptions were pending. One purpose of this statute was to enable an appeal from the final decree to be taken and sent up to the Supreme Judicial Court at the same time that the exceptions were sent, and thus save unnecessary duplication of appellate proceedings. But since the case of Sullivan *v.* Roche attracted attention to the common law appeal above described, litigants are led, out of excessive caution, to appeal from the order for a decree, as may be done in actions at law as to orders for judgments, with the result that the entry of the final decree is postponed by this appeal; whereas, if they allowed the final decree to be entered, their rights would be fully protected by an appeal from that decree.

Furthermore, not only does the filing of an appeal from the "order" of a decree indefinitely postpone the entry of a final decree but, where there is a possibility of such an appeal from the "order", it is considered that no final decree can be entered until the expiration of twenty days even if no appeal from the "order" actually has been claimed.

We think this unforeseen complication which interferes with prompt administration should be removed. The easiest and best remedy appears to be to free equity cases from the useless common law appeal with which they were never burdened until 1921 (see St. 1920, c. 2), for St. 1918, c. 257, never took effect before the General Laws superseded it. The simplest way to do this is to eliminate the reference to equity cases in the 7th and 8th lines of G. L., c. 231, § 96, and the reference to § 96 in § 144. Exceptions in equity cases, and appeals from interlocutory and final decrees (G. L., c. 214, §§ 19, 26), which remain unaffected, furnish ample means of reviewing decisions in equity cases.

We submit, in Appendix A, a draft of an act to carry out our recommendation.

THE RULE-MAKING POWER AND DECLARATORY JUDGMENTS.

In our First Report (p. 33) we quoted as one of the fair grounds of criticism of our system by the business community, the statement that "we provide no method by which business men can find out what a contract means unless one of them breaks it." It seemed to us "unfortunate that a man who wishes to do his full duty under a contract of doubtful meaning must act at his peril and expose himself to be mulcted in damages to find out its true meaning, and that the public should be put to the expense of a trial on damages in place of a suit to obtain a declaratory judgment of the rights of the parties." We recommended the passage of a short statute of four lines in regard to procedure for declaratory judgments. The effective administration of such procedure, which has been in force in Scotland for some three hundred years and in England for about seventy-five years, was described in the account by Professor Sunderland reprinted in Appendix A of that report. A considerable body of judicial experience since 1873 in the administration of this procedure for the guidance of courts is available. We expressed the opinion that, "If the English courts have been able to administer a rule of four lines in such a way as to make the proceeding of practical value to the community, we believe the Massachusetts courts can do the same thing without doing anybody any harm."

There was also before the legislature a longer bill of sixteen sections introduced by the Commissioners on Uniform State Laws and proposed by the National Conference of Commissioners on Uniform State Laws. We stated that we had considered this bill and that we saw no reason why Massachusetts needs so long a statute as the so-called "Uniform Act"; that we believed attempts to make court procedure uniform in all states to be a mistaken one which is likely to obstruct progress; and that court

procedure seems to us peculiarly one for local experiments in convenience and effectiveness. We are still of this opinion and we are opposed to the form of the Uniform Act.

The fact that there were two competing drafts on this subject may have contributed to the result that no action was taken by the legislature.

We have again considered this matter in the light of the belief expressed in the report of the Judicature Commission (p. 32) that where an extension of rule-making power in regard to some particular matter is a better method of experiment than the slower process of legislative regulation the legislature will grant such extension. We feel that in beginning a practice of this kind which, while old and generally understood elsewhere, is new in this Commonwealth, the details of practice can be worked out better by rules of court than by such specific legislative regulations as are contained in the proposed Uniform Act.

Following out this idea, we now suggest that a method of gradual experiment under rules of court will be the simplest method of proceeding and will avoid the competition between the drafts hitherto submitted to the legislature. Accordingly, we submit a bill to authorize the courts to provide by rule for this procedure on both the equity and the law sides of the courts. Our courts can be relied on not to take on the burden of deciding moot questions. They have enough to do now without inviting cases in which a decision can accomplish no useful object. But if their rule-making power is expressly extended to cover a provision for this sort of procedure, we believe that they can work out a practice which will not only be fair but which will save time and money for both litigants and public in cases to which it is adapted. The advisability of extending the rule-making power to cover this subject is indicated by the statement of Professor Sunderland, who spent six months studying the various branches of English practice on the spot, that "So useful and effective has this practice become in England that several judges of the High Court are frequently engaged simultaneously in making declarations of rights and the size of the dockets which they dispose of is eloquent testimony of the speed with which the work can be done."

Therefore, we recommend that section 3 of chapter 213 of the General Laws be amended by adding after the clause "Tenth" the following:

Tenth A, Providing that suits at law or in equity shall not be open to objection on the ground that a merely declaratory judgment, order or decree is sought thereby, and providing for procedure under which the court may make binding declarations of right whether any consequential judgment or relief is or could be claimed or not, provided that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method

of obtaining service on, or jurisdiction over, parties or to affect their right to jury trial.

We believe that a statute thus extending the rule-making power of the court to provide for such procedure would avoid the feeling in the minds of some members of the bar, that a statute such as the proposed Uniform Act or the other shorter forms hitherto suggested, might involve an uncertain extension of the relative jurisdiction of the courts at law and in equity. The act which we now propose contemplates two rules, one on the law side of the court and one on the equity side of the court, and the proviso at the end of the draft will avoid questions which might otherwise arise as to results of the act.

These rules, made under this authority, would regulate the procedure on each side of the court simply by allowing prompt decision of questions, which ordinarily would be questions of law, without waiting for a technical breach of contract, or of some other right or duty, which may often involve, not only serious risk of loss, but friction and an expensive inquiry into possible damages. In other words, the procedure for declaratory judgments avoids a technicality and simplifies and shortens procedure in cases for which it is adapted.

EQUITY JURISDICTION IN THE PROBATE COURTS.

G. L., c. 215, § 6, gives jurisdiction in equity as to all matters of which the Probate Courts now have or may hereafter be given jurisdiction. This means that they have jurisdiction in equity in partition which is not specifically enumerated in section 6 as are some matters. While it is an omnibus clause, it still does not give jurisdiction in equity over one or two important subject matters which vitally touch the administration of estates, such as trusts of personalty, and even realty, created by or arising by construction of law out of the acts of a deceased testator or intestate. For example, one may in his lifetime receive $5,000 on an oral trust. After his death a dispute arises as to ownership. Why should not the Probate Court have jurisdiction? It would seem proper to restrict such jurisdiction to cases where the one sought to be charged as trustee was a deceased person whose estate was in course of settlement in the court.

Again, G. L., c. 204, § 1, provides for specific performance by order of Probate Court if a person who has entered into a written agreement for the conveyance of real estate dies, etc. But in Derby *v.* Derby, 248 Mass. 310, the Supreme Judicial Court says the Probate Court has not general equity jurisdiction but is limited to cases coming under section 1, chapter 204; that it has not general equity powers under section 6, chapter 215.

That is plain. The Probate Court has not and should not have general equity powers save in matters the jurisdiction of which is conferred upon them by statute, such as matters relating to the administration of estates, but the Supreme Judicial Court in cases like the Derby case above says it is not a matter relating to the administration of an estate. In other words, the deceased's representative may be required to carry out the contract of the deceased if it is in writing, but not if the obligation to convey arises by operation of law. In either case, the deceased's estate wins or loses, but in one the result may be obtained in the Probate Court, and in the other, the same result may not be obtained there.

No one has ever satisfactorily defined "matters (in equity) relative to the settlement of the estates of deceased persons." A contract by the deceased to convey land apparently does not relate to the settlement of the estate of a deceased person, though it may be needed or its proceeds to settle his affairs, and it is only by chapter 204, section 1, that the Probate Court may deal with it if the contract is in writing.

We recommend an amendment of section 6, chapter 215, as to the equity powers by adding after trusts the words "under written instruments or trusts created by parole, constructive or resulting trusts provided the adjudication of the latter questions involve in any way the assets of the estate of a deceased person."

Section 1 of chapter 204 might be amended by adding after the word jurisdiction in the fourth line the words "in equity," and by extending the same to include specific performance of all contracts, oral or arising by construction of law made by a testator or intestate for the conveyance of land as well as jurisdiction in equity to cancel any deeds, releases or other conveyances or acquittances executed by a deceased person whose estate is in course of settlement, and for reconveyance by persons alleged to be improperly holding or retaining real estate belonging to the deceased. The Probate Courts have the right to entertain equitable replevin as to personalty. (See Mitchell *v.* Weaver, 242 Mass. 331.) Why not similar power as to realty? Of course, it can be said an administrator cannot bring such bills unless licensed to sell, but why, if licensed, should not he, and if it is not necessary to sell, the heirs, or any of them, recover their inheritance, real or personal in one place? The remedies thus granted to the estate should, of course, be open to those who claim from the estate and need the aid of equity.

SEPARATE SUPPORT.

It has been evident for many years that in a large number of cases much better results could be achieved if separate support cases could be heard on the civil side of district courts. The machinery of these tribunals is better fitted to deal with them and to obtain results for the aggrieved party than is the Probate Court. The probation officers who collect so much money on the criminal side of those courts could be utilized not only for purposes of investigation and "follow-up" work and the collection of payments, for which there is no machinery in the Probate Court other than the ancient process of contempt. The latter is dependent on service within the Commonwealth on the respondent and the cost of service, not only of the petition, but frequently for service of capias by sheriff or constable, puts an intolerable burden on the wife or mother who seeks aid because her husband has failed to pay. Out of funds for her support she must pay to get justice. Again, in the outlying districts she must frequently go a long distance, or wait for some time for a sitting of the court in her community or near by. The district courts have civil and criminal jurisdiction. If the husband absconds, the Probate Court may not bring him back, the criminal court can. The Probate Court is at a distinct disadvantage. It may put a man in jail but frequently cannot get money for the wife and children. The criminal court can send him to the house of correction and order the county to pay so much a day to his wife and children if he is able to work.

The people do not understand the results in the Probate Court. Women complain, "Is this justice?" It does no good to say "you cannot get blood out of a stone, you should have him arrested, all we can do is put him in jail." As far as they are concerned the court has failed, has broken down, — it no longer holds their respect because it cannot make him pay. This refers, of course, to the great body of cases, not to the few where the respondent has property which can be reached by attachment.

They will not go to the criminal courts, moreover, as they want a decree of custody, or they want a decree of separate support (section 33, chapter 209) which will enable them to convey their property as if sole. Also they naturally prefer a civil to a criminal court if they are at all sensitive.

Again, frequently, if they have come to the Probate Court and failed to enforce the order made for support, municipal and district court judges have declined to hear their complaints on the criminal side, because the Probate Court has passed upon them. This is contrary not only to a

recent statute (St. 1925, c. 126), but also to legal principles. The exercise of a civil right deprives no one of a right to have a crime involved in the civil injury punished, as was pointed out by the Judicature Commission (Final Report, p. 44), which recommended the statute (St. 1925, c. 126) which expressly declares this principle. It may be said that in the separate support action and in the nonsupport action they seek the same thing. Not necessarily. In the former they can get things they cannot get in the latter and if in the latter they do not get support, why should not the criminal court be open to them? Under the statutes it is; sometimes under the administration of the latter it is not.

We think the situation should be cured. The Judicature Commission suggested one method of curing it in their Final Report in 1921, pp. 43–46 and 141–142, but only one section of the act recommended by them was adopted by the Legislature in 1925 (St. 1925, c. 126, already referred to).

Guardianship and Administration.

G. L., chapter 193, section 2:

As to the standing of a guardian to bring petition for appointment for administration where his ward or wards are the only heirs in the Commonwealth.

G. L., chapter 193, section 2, provides for granting administration on estate of a deceased on assent of husband or wife and all heirs in the Commonwealth, who are of full age and legal capacity. In McDonald *v.* O'Dea, Advance Sheets 1926, page 1125, the Supreme Judicial Court held a grant of administration on assent of guardian of the only heir in Commonwealth void, that G. L., chapter 201, section 37, gives no right to a guardian to petition for administration of the estate where his ward is not entitled "to the residue of the estate." The case also says that administration is a proceeding *in rem*, and does not require actual notice to heirs, — a general notice, if published as directed by court, being sufficient. Therefore, a stranger may petition (a public administrator may not because there is an heir in the Commonwealth) and give public notice, be appointed, but the guardian of the only heir in the Commonwealth cannot do this. He does not have the privileges of a stranger. But why should he not be able to do for his ward what the latter could do for himself if competent and of full age.

Let us take an illustration: A brother in England dies leaving property in Massachusetts and four minor children of a deceased brother in Massachusetts. Should not their guardian in Massachusetts be permitted to apply for or assent to the appointment of himself or some suitable

person with the same effect as if the wards were of age and did so? Should not the statute show favor to our own citizens as the statutes do in many cases?

It seems to us it would be wise to amend chapter 193, section 2, by adding at the end: "the assent of a guardian or conservator shall be construed to have the same effect as that of their wards would have if they were of full age and competent."

SPECIAL JUSTICES PRACTISING IN THEIR OWN COURTS.

In the special report printed in Appendix B, made at Your Excellency's request, we called attention to the recommendation of the Judicature Commission, that the statute prohibiting practice, in their own courts, by justices of district courts should be extended to special justices of those courts. We think the present law, which allows special justices to practice in their own courts, is a serious blemish in our judicial system. We believe that it breeds distrust of those courts which, because of their large volume of the smaller cases, come in contact with more citizens than any other courts, and therefore represent the administration of justice to many persons who seldom or never appear in other courts. While there is a practical reason for allowing special justices to engage in such practice in some of the smaller districts, as explained in our special report, we think this is unfortunate.

G. L., c. 218, § 40, provides that in case of a vacancy in the office or absence or illness or other disability of the justice the senior special justice "shall have and exercise all the powers and duties of the justice." When a special justice thus succeeds temporarily to the position and duties of the regular justice he comes also within the prohibitions applying to the regular justice so long as the vacancy, illness or absence continues, and during that period he cannot appear as counsel in his own court without violating the statute.

This statute, however, provides only an occasional temporary prohibition. Whatever may be the need of allowing such practice in some of the smaller districts, we do not believe there is any reason for allowing it in the larger districts. We believe that it is possible to secure competent special justices in these larger districts and perhaps in some smaller ones who will not take cases in their own courts.

We believe the whole practice should be stopped. It is not universal even under the present law and we call attention to the fact that our opinion is shared by many special justices themselves, as shown by a resolution adopted in 1923 by the Association of Special Justices that —

The obligations of duty and conduct which bind all justices presiding in the courts of the Commonwealth apply with equal force to all special justices,

and further that —

A special justice, by reason of his small compensation and infrequent and uncertain service, is not expected to refrain from the practice of his profession, but his position is one of great delicacy, and he should be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success. (See "Boston Transcript," December 27, 1923, reprinted in "Mass. Law Quart." for May, 1924, pp. 71–72.)

We also call attention to the fact that in 1924 the American Bar Association adopted 34 Canons of Judicial Ethics which had been prepared by a distinguished committee of judges and members of the bar, of which Chief Justice Taft was chairman. Canon 31 provides —

In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practises law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

He should not practise in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy. (See A. B. A. Reports, Vol. LI, 1926, pp. 910 and 918.)

We believe most of the special justices in our district courts are careful about these matters, and have and deserve the confidence of the community, but, as there are more than 140 special justices in the 72 district courts, it may be that some of them are not as careful as they should be to protect their public appearance of, and reputation for, judicial impartiality. In such cases the unfortunate effect on the minds of litigants, especially among the large foreign element, is obvious.

Although we believe that the whole practice should be stopped yet we are aware of the practical difficulties.

We recommend a statute that in districts having a population of , special justices shall be prohibited from practicing in their own courts.

REVIEW OF SOME RECOMMENDATIONS IN PREVIOUS REPORTS.

The Judicature Commission pointed out that the soundest development of a judicial system such as ours must come about gradually. In a continuous study of such a system with a view to its gradual development, which was the purpose of creating the Judicial Council, a number of proposals are formulated and recommended from year to year for what is believed to be the improvement of the system. Some of these are adopted by the Legislature, or by the courts, and some are either rejected or allowed to wait for future consideration. Some are reconsidered and renewed in what is believed to be an improved form by the Council. It is inevitable under these circumstances that the number of recommendations made shall accumulate. Some criticism is occasionally made that the number of recommendations distracts attention and that it would be better to have fewer recommendations. On the other hand, we assume that one of the functions of the Council is to prepare and submit carefully thought out plans for dealing with different parts of the judicial system or its administration, so that such plans will be ready for consideration when the Legislature feels that the time has come to consider them. This has been in accordance with the experience of the past, as illustrated by the action last year of the Legislature in regard to the poor debtor law, or the action of the Legislature in 1922 in regard to civil appeals from the District Courts. In each of these cases the important changes then adopted had been worked out in substance and discussed ten years or more before they were adopted.

After the Judicial Council has considered one subject at length and formulated its recommendations, unless it sees some occasion for reconsidering and revising those recommendations in the light of further discussion, its proper course seems to be to renew them and to pass on to the consideration of other branches of the system. Accordingly the Council follows this course and calls attention to the recommendations in its previous reports by a brief review as follows.

Recommendations Adopted by the Legislature in 1927.

Of the various recommendations contained in our second annual report, dated November 30, 1926 (P. D. 144 of 1926), the Legislature adopted three:

First, The Legislature extended for one year, to July 1, 1928, the act allowing the Chief Justice of the Superior Court to call in District Court justices to try misdemeanor cases with juries. (See St. 1927, c. 282.)

We recommend a further extension of this act for the reasons stated in our second report, pages 9–10. The Council is still of opinion that it should be made permanent and that it is of vital importance to the administration of the criminal law that the act should not be allowed to lapse on July 1, 1928.

Second, the Council recommended that the time for the regular sittings of the Superior Court in the various counties should be fixed by the chief justice of that court. (Second Report, pp. 33–35.) The details of this plan were worked out by the Judiciary Committee of the Legislature and adopted as an experiment for five years to the first Monday of January, 1933. (See St. 1927, c. 306.) As doubts have arisen as to the meaning of the act we recommend an amendment printed in Appendix A, p. 78.

Third, provision was made for compensation for the Secretary of the Judicial Council. (See St. 1927, c. 293.)

The Judiciary Committee also reported favorably on the recommendation in regard to requirements for admission to the bar (see Second Report, p. 63), but the bill (House 1227) did not pass the House.

A bill to revise the poor debtor law by substituting an equitable process after judgment, along lines suggested by the Judicature Commission in its second report (House 1205 of 1921, p. 50), was introduced into the Legislature. It was considered by the Judicial Council and the general plan of it approved. The complicated details were subsequently worked out with the valuable assistance, especially, of Henry D. Wiggin, Esq., Counsel to the House, and Volney Caldwell, Esq., Assistant Clerk of the Municipal Court of the City of Boston, whose practical experience and willing assistance were of great value, and the act was adopted by chapter 334, to take effect March 1, 1928. We believe this act, the plan of which has been under consideration from time to time during a period of more than twelve years, to be an important step in advance.

Other Recommendations of the Judicial Council not yet Adopted.

We also made other recommendations in the first and second reports which have not yet been adopted, as follows:

For slight changes in the statute to encourage the revision of the forms of writs in various courts and the abolition of fictitious attachments, in order that the papers served upon defendants when suits are brought against them shall state the facts and tell them what they are expected to do, instead of containing misleading directions, and sometimes misstatements of fact, under the seal of the court. The present forms contain such misstatements and misleading directions which have bad results

We renew our recommendations of last year in regard to these matters. (See Second Report, pp. 37–44 and 112–113.) We believe these recommendations are important and that if adopted they will help to bring about much needed changes in the forms.

We also recommended a slight change in the statutes providing that copies of all papers in a case, except those used in evidence only, including any "opinion or memorandum of decision" of a court below, should be transmitted by the clerk to the Supreme Judicial Court in connection with any appellate proceeding before the full court. Such memoranda or opinions, whether of the Superior Court or the Appellate Divisions of the District Courts, do not now go before the full bench because they are not strictly part of the "record." Accordingly, the full bench now considers questions on appeal from the courts without knowing the reasons of the judge, or judges, who rendered the decision appealed from. We do not believe that this state of affairs should continue and we think the statute should be broadened so that such papers should be transmitted as a matter of course.

We renew our recommendations in our first and second reports of an act for waiving jury trial in criminal cases, other than capital, in the Superior Court. The constitutionality of such an act was explained by the Supreme Judicial Court in Com. *v.* Rowe, 1926 Adv. Sh., at p. 1763. We have discussed this subject at length in the first and second reports, and for convenient reference this year we simply add the further information contained in an article by Mr. Justice Maltbie of the Supreme Court of Errors of Connecticut as to the practical working of the Connecticut statute, and the opinion of the Connecticut bar in regard to it, which we reprint in Appendix D.

If the Superior Court is to be further relieved by extending the opportunities of service of the District Courts, as we have recommended, in various ways, the District Courts should be relieved of unnecessary duplication of work, and we accordingly renew our recommendation that the mandatory requirement of inquests in cases of death be changed so that "inquests should be held at the discretion of the court and mandatory only when requested by the Attorney General or district attorney of the district." The present mandatory provision often results in duplication or even triplication of expense, as explained in our previous reports. (See First Report, pp. 50–52; Second Report, p. 67.) We renew our recommendation of the bill submitted in the first report, page 146, Appendix C.

For reasons explained in our previous reports, we renew our recommenda-

tions in regard to admission to the bar and in regard to methods of dealing with cases of professional misconduct. (See Second Report, pp. 63–65 and 29–33.)

We renew our recommendations to the Superior Court for a change in the usual form of reference to masters in equity cases, which was explained at length in the First Report, pp. 54–60. (See also Second Report, p. 60.) No legislation is needed to carry out this recommendation.

The majority of the Council renew their recommendation relative to private conversation between husband and wife in cases of domestic relations. (See Second Report, pp. 62 and 116.)

The Council also renews its recommendation made in its first and second reports that all District Courts serving a population of over 100,000 be provided with a third special justice. Such a provision would not entail additional expense except where the service was actually needed, as special justices are paid only when actually rendering service. The Administrative Committee of the District Courts supports this recommendation, a bill for which was printed in Appendix C of our First Report, on page 147. Some of these District Courts handle a large amount of business and should be adequately equipped to take care of it.

We renew the recommendation which we discussed fully in our Second Report as to the separation of debt-collecting from controversial litigation. (See Second Report, pp. 44–47.)

Other recommendations in our first and second reports which have not yet been adopted have been discussed and renewed, with some variations, in other parts of this report.

APPENDIX A.

DRAFTS OF LEGISLATION RECOMMENDED.

AN ACT AS TO APPEALS IN CAPITAL CASES.

Be it enacted, etc., as follows:

SECTION 1. Section thirty-three E of chapter two hundred and seventy-eight of the General Laws, inserted by section one of chapter two hundred and seventy-nine of the acts of nineteen hundred and twenty-five and amended by section four of chapter three hundred and twenty-nine of the acts of nineteen hundred and twenty-six, is hereby further amended by adding at the end thereof the words: — In a capital case the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence, and the court may order a new trial if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If a motion is so remitted, or if any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

AN ACT TO AUTHORIZE MORE ABBREVIATED METHODS OF DECISION AND MORE ABBREVIATED REPORTS OF DECISIONS OF THE SUPREME JUDICIAL COURT.

Be it enacted, etc., as follows:

SECTION 1. Section eight, chapter two hundred and eleven of the General Laws is amended by striking out the words "a proper order, direction, judgment or decree for the further disposition of the case, or cause a rescript, containing a brief statement of the grounds and reasons of the decision, to be filed therein;" and substituting therefor the following: — a rescript which shall contain a proper order, direction, judgment or decree for the further disposition of the case and a brief statement of the grounds and reasons of the decision if no opinion has been written and filed in the case, — so that the whole section shall provide: *Section 8.*

The full court shall, as soon as may be after the decision of the questions submitted to it, make and enter a rescript which shall contain a proper order, direction, judgment or decree for the further disposition of the case and a brief statement of the grounds and reason of the decision if no opinion has been written and filed in the case; or it may by a writ of certiorari or other proper process remove the record of the case, or order it to be removed, into the supreme judicial court, there enter judgment, and remand the record to the court from which it was removed to carry such judgment into effect, or instead thereof, the full court may order a new trial or further proceedings at the bar of the supreme judicial court, or order sentence to be awarded or execution issued in said court.

SECTION 2. Section nine of chapter two hundred and eleven of the General Laws is repealed.

SECTION 3. Section sixty-four of chapter two hundred and twenty-one of the General Laws is amended by striking out the words "make true reports of the decisions upon all questions of law argued by counsel, prepare them" and substituting for them the words: — prepare for publication the decisions of the court, — so that the section shall provide: *Section 64.* He shall attend the law sittings of the court unless excused therefrom by the chief justice, prepare for publication the decisions of the court with suitable headnotes, where that is deemed advisable, tables of cases and indexes, furnish them to the publisher, and superintend the correction, proof reading and publication thereof. He shall in his discretion report the several cases more or less at large according to their relative importance, so as not unnecessarily to increase the size or number of the volumes of reports. The reports of all decisions argued and determined before September first in each year shall be published within ninety days thereafter.

AN ACT RELATIVE TO THE SITTINGS OF THE SUPERIOR COURT.

Be it enacted, etc., as follows:

SECTION 1. Section one of chapter three hundred and six of the acts of nineteen hundred and twenty-seven is hereby amended by striking out the whole of said section and inserting in place thereof the following: —

Section 1. Subject to section thirty-seven of chapter two hundred and fourteen of the General Laws, the chief justice of the superior court from time to time shall establish a regular sitting or regular sittings of said court at each of the places named in section fourteen of chapter two hundred and twelve of the General Laws, may establish special sittings and separate sessions of regular or special sittings at any of said places, may establish sittings for naturalization at any city or town, and may designate the class or classes of business for which any sitting or session is established. The court may hold sittings for naturalization in any city or town. Said court may adjourn any sitting or session from one place

to another within the county, whether it be to a place mentioned in said section fourteen or not, in the manner and with the effect of adjournment to another shire town, and such adjournment shall be subject to all the laws relative to adjournment to another shire town. Jurors summoned for one sitting or session may be used for any other in the same county. Regular sittings shall be established on or before November first in each year for the year beginning the first Monday of January next ensuing, and unless changed shall be held at the same times from year to year, but may be changed at any time by said chief justice. An order establishing or changing a sitting in any county shall be entered on the records of the court in such county, and public notice shall be given by posting a copy of such order in the office of the clerk within fifteen days after the establishment or change of the sitting, or otherwise as said chief justice may direct.

SECTION 2. Section three of chapter three hundred and six of the acts of nineteen hundred and twenty-seven is hereby amended by inserting in the first line, after the word "law", the words: — not created by this act, — by inserting in the second line, before the word "times", the words: — character or purposes or, — by striking out, in the fourth and fifth lines, the words "the provisions of said section fourteen of chapter two hundred and twelve prescribing the places for regular sittings and", — and by striking out, in the eleventh line, the words "sections fourteen and", — and inserting in place thereof the word: — section, — so as to read as follows: — *Section 3.* All provisions of law not created by this act prescribing or regulating the character or purposes or times or places or number of sittings, sessions or adjournments of sittings of the superior court, except the provisions of said section thirty-seven of chapter two hundred and fourteen, shall be of no effect during the time this act shall be in full force; but all other provisions of law in any way having to do with sittings, sessions or adjournments of said court, including the aforesaid provisions of said section thirty-seven, shall during such time be effective for the purposes of regular and special sittings and sessions established hereunder and of adjournments made hereunder, except that writs of venire facias issued under section two of chapter two hundred and seventy-seven of the General Laws, as amended by section seven of chapter three hundred and eleven of the acts of nineteen hundred and twenty-four, shall be issued not less than twenty-eight days before the first Mondays of January and July, respectively.

AN ACT TO ELIMINATE COMMON LAW APPEALS FROM EQUITY PRACTICE.

Be it enacted, etc., as follows:

SECTION 1. Section one hundred and forty-four of chapter two hundred and thirty-one of the General Laws is hereby amended by striking out, in the fourth line, the word "ninety-six."

SECTION 2. Section ninety-six of chapter two hundred and thirty-one of the General Laws is hereby amended by striking out, in the seventh and eighth lines, the words "except as provided for appeals in equity by section twenty-six of chapter two hundred and fourteen."

AN ACT RELATIVE TO THE SITTINGS OF THE FULL BENCH OF THE SUPREME JUDICIAL COURT.

Be it enacted, etc., as follows:

SECTION 1. Chapter two hundred and eleven of the General Laws is hereby amended by striking out the last sentence of section twelve and the whole of section thirteen thereof and substituting therefor the following: — *Section 13.* All cases and matters in any county that may be required to be heard and determined in the supreme judicial court by the full court shall be heard at such times and at such places as the court shall from time to time appoint, with a view to the dispatch of business and the interest of the public. All such cases and matters shall be entered as heretofore provided unless the court orders otherwise, and the court may make such rules or orders, general or otherwise, for the entry and hearing of such cases from time to time as the dispatch of business and the interest of the public may require.

SECTION 2. This act shall take effect on the day of nineteen hundred and .

For draft of An Act to extend the rule-making power of courts to allow procedure for declaratory judgments, see page 66.

For draft of An Act to authorize the Supreme Judicial Court to stay execution of the sentence of death pending the decision of judicial questions, see pages 34–35.

For draft of An Act relative to the negligent operation of motor vehicles, see page 37.

For other acts recommended of which drafts have been submitted, see reference in the index on page 5 to the pages in the First and Second Reports of the Judicial Council, where they appear.

This report contains other recommendations for legislation of which drafts have not yet been prepared.

APPENDIX B.

SPECIAL REPORTS DURING THE YEAR.

SPECIAL REPORT OF THE JUDICIAL COUNCIL RELATIVE TO JUSTICES, SPECIAL JUSTICES AND CLERKS OF DISTRICT COURTS IN ANSWER TO A LETTER FROM HIS EXCELLENCY THE GOVERNOR DATED FEBRUARY 28, 1927.

MARCH 7, 1927.

To His Excellency the Governor of Massachusetts.

YOUR EXCELLENCY: — The Judicial Council has received and considered your letter of February 28, 1927, asking questions, the answers to which may suggest some general rules which will help to guide you in making appointments to the District Courts of the Commonwealth.

In our judgment, it would be better for the judicial system of the Commonwealth, were it possible to bring it about, if no justice, special justice, clerk, or assistant clerk of a District Court, nor their partners, appeared as counsel in their respective courts, as such appearance may give rise to misunderstandings on the part of litigants and others which are not in the public interest.

As far as justices, clerks, and assistant clerks are concerned, your questions seem to be answered by G. L., c. 218, § 17, which provides that:

> A justice, clerk, or assistant clerk of a district court shall not be retained or employed as attorney in an action, complaint, or proceeding pending in his court, or which had been examined or tried therein; and a special justice shall not be so retained or employed in any case in which he acts or has acted as justice. (See also § 18.)

As to the partners of officials thus mentioned, while the statute does not specifically include them, it seems to us that they should not practice in the court as the profit-sharing incidents of the partnership relation would result in an apparent indirect violation of the purpose of the statute and would not, in our opinion, be in the public interest because it would cause the same sort of misunderstanding to which we have already referred.

Before answering your questions as to the partners of special justices, it is necessary to consider the position of special justices themselves. The statute quoted does not apply to them except by expressing the obvious rule of conduct that they should not be employed in a case in which they, themselves, have acted in a judicial capacity. Otherwise, they may practice before the other justices of the court as far as the statute is concerned. It has been found impracticable in this Commonwealth to extend to

special justices the rule laid down by the statute for regular justices. Although the Judicature Commission recommended that the statute be extended to include special justices (see Report, H. 1205 of 1921, pp. 52–53), that recommendation has not been followed, probably for the practical reason that it would render our present District Court system unworkable, in some sections at least of the Commonwealth. In many District Courts, the special justices seldom sit. Their fees, which are on a per diem basis during their time of sitting, are small in amount and, if their appointment implied an incapacity to practice in their own district courts, it would be impossible in some districts to find competent lawyers to accept appointments as special justices. All this would apply with even greater force if their partners could not practice in the local courts. Accordingly, the legislature and the bar have long recognized the right of a special justice to practice in his own court and try cases before the justice of that court or before another special justice. Appointments to office have been accepted on that understanding. This seems to be necessary for the reasons stated while the present plan of the District Courts continues. It follows, of course, that wherever a special justice may practice in his own court, his partner may practice under similar conditions. We assume, of course, that no member of the bar would consent to appear before his own partner as a judge. We are speaking merely of the right to practice before the other justices of the court.

As a matter of fact, in our opinion in the great majority of cases, a special justice derives no advantage from his position with the regular justice or other special justices in his court before whom he appears. The difficulty of the situation from the point of view of the public interest arises from the effect in the minds of litigants or others, particularly among the foreign element, who may think there is some advantage when there is not.

There is no established legal "Code of Ethics" which deals explicitly with this subject, but we believe it to be more in the public interest, wherever the circumstances permit, that special justices be appointed from among those who do not, and whose partners do not, practice in their own District Courts. For the reasons above stated, however, no hard and fast rule can be applied.

Your questions also relate to "office associates" of justices, special justices, clerks, and assistant clerks, as well as to their partners. While "office associates," as we understand the term, do not share the professional income of each other as partners do, the public may not differentiate between the two. This kind of association may be one of greater intimacy in many parts of the Commonwealth than it is in the metropolitan district where we believe there are many lawyers, sharing offices in order to reduce the cost of rent and clerical service, who have no more intimate relation than they have with other lawyers on the same floor or other parts of a

large office building. While there is nothing inherently wrong in a judge's or clerk's "office associate" practising in the court, yet, it is likely to cause the same sort of public misunderstanding as has been described in the case of partners. Accordingly, we believe that similar considerations apply in the public interest as in the case of partners. While here again no hard and fast rule can be made, it seems to us preferable as far as practicable, that the continuance of such association should be avoided in appointments of justices, special justices, clerks, and assistant clerks of District Courts.

We believe that we have covered the substance of all your questions by what we have said. If not, kindly advise us. Judge Loring was unable to attend the meeting of the Council at which this matter was considered and took no part in this report.

Respectfully submitted,

Signed by all the MEMBERS OF THE COUNCIL
except JUDGE LORING.

SPECIAL REPORT OF THE JUDICIAL COUNCIL RELATIVE TO AN AUTOMOBILE ACCIDENT ADJUSTMENT BOARD IN ANSWER TO A LETTER FROM HIS EXCELLENCY THE GOVERNOR DATED JANUARY 4, 1927.

April 23, 1927.

His Excellency the Governor, State House, Boston, Massachusetts.

Your Excellency: — As you requested, we have studied the subject of an Automobile Adjustment Commission as proposed by J. E. McConnell, Esq., in his letter to you dated December 27, 1926, and by you referred to us for study and report January 4, 1927. Similar suggestions have been made in recent years.

Stated briefly, Mr. McConnell proposes a Commission or Board of Arbitration to handle all actions for damages arising out of automobile collisions, whether to person or property, and thus relieve the Courts of the great amount of work now given to such cases. In order to compel parties to resort to this tribunal it is proposed to refuse them registration or license unless and until they waive their constitutional right to a trial by jury.

In the first place there is grave doubt as to the constitutionality of such legislation.

But assuming for the moment that it would be constitutional, the practical question is, how much would it relieve the Courts, how many cases that now occupy the time of our Courts would be embraced by its provisions.

It is obvious that, since there must be at least two parties to a controversy, the proposed legislation would only be effective in the event that both or all had waived their constitutional rights. Therefore it would not affect controversies in which one of the parties was a pedestrian, a bicyclist, a traveler in a horse-drawn vehicle, in an auto bus, in a street car, or in a taxicab, etc., except at his option; nor would it affect the rights of automobilists from without the State, unless we apply the law to them as soon as they cross the border, by refusing them the use of our highways until and unless they register in Massachusetts and waive their constitutional rights. It is not difficult to forecast the counter legislation that might be provoked in other states.

We add at the end of this letter an appendix for convenience containing references to literature on the subject.

It has been suggested that if such a commission were established, parties would voluntarily waive their constitutional rights in order to avail themselves of its provisions. If this is so, the courts can accomplish a similar result without any legislation by holding special traffic sessions for hearings without juries and with technicalities waived — similar to the speedy cause list which we recommended in our First Annual Report,

pages 60–62, and which has been adopted in the Municipal Court of the City of Boston, as explained in our Second Annual Report, pages 11–12.

The fact that such a Commission as is proposed could control but a small proportion of the accidents in question and that there would be many accidents where, of several occupants of a vehicle, one could be brought before the Commission while the others could still go before the Courts as now, although the facts are the same and all cases should in the interest of economy be disposed of by one trial and before one tribunal, inclines us to believe that the proposed Commission would be ineffective.

The proposed legislation has been likened to the Workmen's Compensation Act. But there are marked differences between them. The proposed measure rests upon compulsion, the Workmen's Compensation Act upon election. The jurisdiction of the Workmen's Compensation Board rests upon the theory that it has been voluntarily accepted by both employer and employee. The employer accepts it by insuring and posting the required notice, the employee accepts it by continuing to work after notice posted without protest. It is true that the defenses of fellow servant and assumption of the risk are denied the employer who does not insure. But the Act rests upon the assumption that it applies only to those who voluntarily elect its provisions. That this is not a false or idle assumption is demonstrated by the well-known fact that there are corporations in Massachusetts, some of them employing many people, who do not insure, but rest upon their common law rights as modified.

Again the main purpose of the proposed legislation is to clear the congested dockets of our Courts. That was not the [main] purpose of the Workmen's Compensation Act. It had long been recognized that, in manufacturing especially, a certain number of lives and limbs were bound to be lost or injured. Their loss and injury was and is so constant and regular that they could be reduced to percentages which can be annually forecast with reasonable accuracy by those interested in the subject. It is the theory of the Workmen's Compensation Act that this human wastage is a cost to be borne by the industries and occupations embraced within its provisions, rather than by the community in which the insured employee lives.

Furthermore the proposed legislation would presumably be intended to affect only the registrant or licensee personally. If a plan was suggested to make it affect his wife, children, employees or guests when riding in his automobile, it would not only raise an added doubt as to the constitutionality but an added doubt as to the fairness as a matter of policy of such a statutory rule of indirect waiver. There are many accidents that involve all these classes of persons.

If it were suggested that the registrant or licensee should be required to waive as a condition of his registration or license and that these other

persons should be given the option to waive or not after the accident happened, such a one-sided arrangement would hardly seem fair.

Without attempting to exhaust the list of those who can not be affected by the proposed legislation, the foregoing instances raise a serious doubt as to its effectiveness, if enacted.

There are no official statistics bearing directly upon this question that have come to our attention, but there is found on page four of the "Report of the Attorney General and the Insurance Commissioner Relative to Accidents Caused by the Operation of Motor Vehicles", Senate No. 322, dated January, 1920, a classification of the killed and injured for the years 1914 to 1918. Similar tables will be found in the annual reports of Department of Public Works, 1920–1925. These tables show that less than half of those injured were occupants of motor vehicles. But they do not show how many of those injured in motor vehicles were resident operators of motor vehicles, or were injured by a resident operator of a car.

From a report of an Accident and Liability Insurance Company which made an examination of all the accidents to persons or property reported by its insured arising from motor vehicle collisions during the calendar year 1926 in Western Massachusetts we learn that there were substantially 3,000 cases, of which only 662, or 22 per cent, could be affected by the proposed legislation. Up to date these cases have been disposed of by settlement, have been abandoned or have not been pressed except 23, of which 20 were property damage cases and three personal injury cases. Two of these cases have since been settled, only one has been tried, and 20 are still pending.

Without stressing these figures too much, it is evident from all the foregoing that the proposed tribunal, even if constitutional, would control the disposition of a very small percentage of accidents arising from the operation of motor vehicles upon the highway.

We would also call your Excellency's attention to the Report of the Attorney General and Insurance Commissioner already referred to. It was their judgment that if the Compulsory Insurance Bill were enacted it would "effect a large amelioration of the conditions which led to their investigation." The Compulsory Insurance Law thus recommended and adopted went into effect January 1, 1927, and it is still too soon to pass upon the efficiency of the legislation adopted so far as the Courts are concerned. We suggest the wisdom, for this reason, if for no other, of letting this suggestion remain in abeyance for the present.

Judge Loring has been unable to take part in the consideration of this subject.

Respectfully submitted,

Signed by all the MEMBERS OF THE COUNCIL
except JUDGE LORING.

APPENDIX.

SOME REFERENCES RELATING TO THE SUBJECT.

Typewritten transcript of the hearings before the Attorney General and the Insurance Commissioner, September 16 and 17, 1919, on file in the office of the Attorney General.

Article by Hon. Robert S. Marx of Cincinnati, Ohio, on "The Curse of the Personal Injury and a Remedy" in the American Bar Association Journal for July, 1924.

Draft of an Act by Weld A. Rollins, Esq., presented to the Attorney General and the Insurance Commissioner annexed to the report above referred to, numbered Senate 322 of 1920, and referred to on page 17 of that report.

House Bills 667 and 668 of 1920.

Article by Arthur A. Ballantine, Esq., entitled "A Compensation Plan for Railway Accident Claims", in Harvard Law Review for May, 1916, reprinted in the Massachusetts Law Quarterly for August, 1916, p. 205.

[Senate Bill 77 and House Bill 561 of 1927 for State funds.]

APPENDIX C.

STATISTICAL TABLES.

TABLE OF CASES DECIDED BY THE SUPREME JUDICIAL COURT, 1874–1926.

COURT YEAR BEGINNING SEPTEMBER 1.	Number of Cases Decided.	Reported in the Following Volumes of Massachusetts Reports.	COURT YEAR BEGINNING SEPTEMBER 1.	Number of Cases Decided.	Reported in the Following Volumes of Massachusetts Reports.
1874	394	115, 116, 117, 118	1901	381	179, 180, 181, 182
1875	418	118, 119, 120	1902	348	182, 183, 184
1876	403	120, 121, 122, 123	1903	354	184, 185, 186
1877	388	123, 124, 125	1904	384	186, 187, 188
1878	334	125, 126, 127	1905	484	188, 189, 190, 191, 192
1879	316	127, 128, 129	1906	441	192, 193, 194, 195, 196
1880	372	129, 130, 131	1907	397	196, 197, 198, 199
1881	293	131, 132, 133	1908	413	199, 200, 201, 202, 203
1882	344	133, 134, 135	1909	356	203, 204, 205, 206
1883	374	135, 136, 137	1910	390	206, 207, 208, 209
1884	367	137, 138, 139, 140	1911	388	209, 210, 211, 212
1885	385	140, 141, 142	1912	427	212, 213, 214, 215
1886	399	142, 143, 144, 145	1913	472	215, 216, 217, 218
1887	321	145, 146, 147	1914	432	218, 219, 220, 221
1888	349	147, 148, 149	1915	433	221, 222, 223, 224
1889	344	149, 150, 151, 152	1916	417	224, 225, 226, 227, 228
1890	321	152, 153, 154	1917	391	228, 229, 230, 231
1891	422	154, 155, 156, 157	1918	340	231, 232, 233
1892	354	157, 158, 159	1919	341	233, 234, 235, 236
1893	341	159, 160, 161, 162	1920	378	236, 237, 238, 239
1894	333	162, 163, 164	1921	356	239, 240, 241, 242
1895	356	164, 165, 166	1922	397	242, 243, 244, 245, 246
1896	371	166, 167, 168, 169	1923	422	246, 247, 248, 249
1897	397	169, 170, 171, 172	1924	419	249, 250, 251, 252, 253
1898	339	172, 173, 174	1925	483	253, 254, 255, 256, 257
1899	366	174, 175, 176	1926	515	257, 258, 259
1900	381	176, 177, 178, 179			

Supreme Judicial Court Entries for All Counties, September 1, 1926, to September 1, 1927.

[Not including Full Bench Cases.]

County.	Equity.	Transferred to Superior Court.	Referred to Masters.	Prerogative Writs.	Petitions for Admission to Bar.	Other Proceedings.
Worcester	4	–	3	7	–	–
Essex	4	–	–	10	4	–
Plymouth	1	–	–	3	–	1
Middlesex	4	–	1	27	7	2
Norfolk	–	–	–	10	–	–
Franklin	–	–	–	–	1	–
Hampden	4	–	–	9	–	–
Berkshire	1	–	–	4	3	–
Barnstable	–	–	–	–	–	1
Bristol	10	–	–	24	2	1
Nantucket	–	–	–	–	–	–
Dukes County	–	–	–	–	–	–
Hampshire	–	–	–	–	2	–
Suffolk	116	6	12	94	1,102	2,154
Totals	134	6	16	179	1,121	2,159

Detailed Entries in the Supreme Judicial Court for Suffolk County.

[These figures do not include the appellate business entered in the Supreme Judicial Court for the Commonwealth.]

Law docket:		
Petitions for admission to the bar	1,102	
Mandamus	42	
Habeas corpus	26	
Certiorari	13	
Writ of error	8	
Writ of prohibition	5	
Information in the nature of quo warranto	1	
Petition for disbarment	1	
Total entries on law docket		1,198
Equity docket:		
Suits in equity	116	
Informations by the attorney general (for failure to file corporation returns, etc.)	2,152	
Total entries on equity docket		2,268
Total entries on both dockets		3,466

Of the 116 equity cases entered six were transferred to the Superior Court and twelve were referred to masters. We have no information as to what was done in the 98 cases entered and not so transferred or referred. We are informed that the amount of time spent in court in Suffolk County by single justices between Sept. 1, 1926, and Sept. 1, 1927, was 251 hours and 10 minutes. How much time was spent by the various justices off the bench in the examination of masters' reports and other work connected with the single justice sittings we are not informed except by the estimate by justices of the court that the total time on and off the bench amounts roughly to the time of one judge.

ABSTRACT AND TABULAR STATEMENT OF THE PRELIMINARY[1] RETURNS RELATIVE TO THE LAW, EQUITY, DIVORCE AND CRIMINAL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1927, IN COMPLIANCE WITH GENERAL LAWS, CHAPTER 221, SECTION 24, AS AMENDED BY CHAPTER 131 OF THE ACTS OF 1924, AND BY CHAPTER 64 OF THE ACTS OF 1927 (NATURALIZATION BUSINESS NOT INCLUDED).

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COUNTIES.	NUMBER PENDING AT BEGINNING OF YEAR.					NUMBER ENTERED DURING YEAR.				NUMBER ACTUALLY TRIED.				
	CIVIL CASES.				Criminal Cases.	CIVIL CASES.				CIVIL CASES.				Criminal Cases.
	Jury.	Jury Waived.	Equity.	Divorce.		Jury.	Jury Waived.	Equity.	Divorce.	Jury.	Jury Waived.	Equity.	Divorce.	
Barnstable	136	67	41	16	85	71	42	9	2	29	-	-	-	19
Berkshire	329	117	97	44	154	144	72	24	1	23	3	-	-	9
Bristol	1,500	306	332	188	1,047	610	284	128	3	136	73	71	2	107
Dukes	14	15	10	6	6	6	8	1	-	1	1	-	2	1
Essex	4,020	481	633	266	1,271	1,674	406	220	10	311	61	26	11	323
Franklin	210	78	86	32	24	155	27	25	1	27	3	15	1	17
Hampden	2,299	736	565	556	563	1,152	480	202	337	203	34	4	272	93
Hampshire	215	87	57	40	73	99	52	27	1	16	-	-	1	46
Middlesex	6,795	1,395	936	111	336	3,129	742	437	26	472	43	30	24	654
Nantucket	3	3	-	-	-	1	6	-	-	1	2	-	-	10
Norfolk	1,651	376	195	106	452	766	264	103	9	107	26	61	8	150
Plymouth	1,024	313	195	140	407	396	142	79	57	87	18	9	39	99
Suffolk	18,074	4,215	4,014	406	496	9,701	2,162	2,135	104	1,149	380	342	89	935
Worcester	3,626	761	420	201	303	1,502	423	265	3	295	52	43	3	202
Total	39,896	8,950	7,581	2,112	5,217	19,406	5,110	3,655	554	2,857	696	601	452	2,665

[1] We are informed that a few of these returns have been corrected slightly since this table was printed, but the corrections do not materially alter the results for the purposes of this report.

[1] We are informed that a few of these returns have been corrected slightly since this table was printed, but the corrections do not materially alter the results for the purposes of this report.

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE LAW, EQUITY, DIVORCE AND CRIMINAL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1927, IN COMPLIANCE WITH GENERAL LAWS, CHAPTER 221, SECTION 24, AS AMENDED BY CHAPTER 131 OF THE ACTS OF 1924, AND BY CHAPTER 64 OF THE ACTS OF 1927 (NATURALIZATION BUSINESS NOT INCLUDED) — *Continued.*

COUNTIES.	NUMBER DISPOSED OF BY AGREEMENT OF PARTIES OR BY ORDER OF COURT.				NUMBER MARKED INACTIVE DURING THE YEAR UNDER RULE OF COURT.				NUMBER MARKED INACTIVE AT ANY TIME AND REMAINING UNTRIED OR UNDISPOSED OF.				NUMBER PENDING AT END OF YEAR.				
	CIVIL CASES.				CIVIL CASES.				CIVIL CASES.				CIVIL CASES.				
	Jury.	Jury Waived.	Equity.	Divorce.	Jury.	Jury Waived.	Equity.	Divorce.	Jury.	Jury Waived.	Equity.	Divorce.	Jury.	Jury Waived.	Equity.	Divorce.	Criminal Cases.
Barnstable	24	28	8	–	31	19	17	15	29	18	17	15	157	81	42	18	57
Berkshire	146	57	16	–	54	34	14	44	46	–	–	44	302	130	104	45	169
Bristol	469	121	21	1	309	67	105	181	235	67	93	179	1,505	396	368	188	1,151
Dukes	5	3	2	–	–	–	–	–	–	–	–	–	15	19	8	6	3
Essex	1,383	232	117	8	729	129	246	248	596	124	243	245	4,182	634	708	267	1,066
Franklin	109	23	10	2	41	28	31	26	38	28	31	26	264	78	101	31	30
Hampden	879	324	93	6	479	213	152	69	405	172	140	68	2,385	881	675	662	485
Hampshire	62	24	10	–	33	16	12	27	33	15	12	27	230	109	73	36	86
Middlesex	2,368	430	221	8	1,301	244	298	34	1,140	435	285	–	7,556	1,707	1,122	78[1]	190
Nantucket	–	–	–	–	–	–	–	–	–	–	–	–	–	4	–	–	–
Norfolk	578	166	61	10	296	74	37	99	265	68	34	95	1,812	466	237	105	438
Plymouth	351	74	30	36	248	86	43	108	176	68	42	105	982	363	235	187	417
Suffolk	7,321	1,483	1,545	23	6,266	2,293	1,191	169	6,257	2,290	1,174	169	20,454	4,894	4,604	325	615
Worcester	1,348	317	141	1	490	164	76	190	444	154	71	188	3,555	821	516	200	267
Total	15,043	3,282	2,275	95	10,277	3,367	2,222	1,210	9,664	3,439	2,142	1,161	43,399	10,583	8,793	2,148	4,964

[1] Indictments, 145; appealed cases, 35.

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE LAW, EQUITY, DIVORCE AND CRIMINAL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1927, IN COMPLIANCE WITH GENERAL LAWS, CHAPTER 221, SECTION 24, AS AMENDED BY CHAPTER 131 OF THE ACTS OF 1924, AND BY CHAPTER 64 OF THE ACTS OF 1927 (NATURALIZATION BUSINESS NOT INCLUDED) — *Concluded.*

COUNTIES.	Number wherein Verdict of Jury in Civil Cases has been set aside by Court on Ground it was Excessive.	CRIMINAL CASES.				NUMBER OF DAYS DURING WHICH COURT HAS SAT FOR HEARING.				
		Number of Indictments Returned.	Number of Appealed Cases Entered.	Number Disposed of Without Trial.	Number wherein New Trial has been Ordered.	CIVIL CASES.				Criminal Cases.
						Jury.	Jury Waived.	Equity.	Divorce.	
Barnstable	–	22	77	108	–	16	–	–	–	8
Berkshire	–	51	116	143	–	33[1]	13[1]	–	–	19
Bristol	1	359	671	819	–	159	26	12	1	64
Dukes	–	6	7	12	–	3[2]	–	–	–	–
Essex	–	497	1,273	1,736	–	370	35	23	½	176
Franklin	–	25	21	48	–	15	5	3	2 hours	19
Hampden	2	216	289	490	–	224	34	25	35	43
Hampshire	–	92	91	136	–	29	1⅘	1/10	1/10	36
Middlesex	–	866	1,648	2,016	3	536	73	24	5	394
Nantucket	–	1	9	–	–	4	4	4	–	4
Norfolk	2	184	386	434	–	115	22[3]	–[3]	–[3]	90
Plymouth	–	171	380	499	1	90	10	10	5	81
Suffolk	3	983	4,401	4,835	8	1,409	168	299	15	673
Worcester	–	457	1,386	1,683	–	358	50	38	1	168
Total	8	3,930	10,755	12,959	12	3,361	441⅘	438 1/10	62⅗ and 2 hrs.	1,775

[1] Including jury-waived and equity cases.

[2] Number of days for civil and criminal cases reported as "three days for all classes of cases."

[3] Including equity and divorce cases.

No.	R
266	
1238	
1229	
159	
160	
4475	
4474	
4038	
4114	
4473	
4803	
7374	
7375	
7519	
6407	
9358	
9865	
10158	
11675	
12030	
12672	
14452	
14687	
14688	
14689	
14690	
14699	
16787	
12317	
15414	
14323	
10073	
14700	
13068	
14471	

Results of Murder Trials in Middlesex County, January 1, 1917, to January 1, 1927.

No.	Name.	Verdicts.		
		Not Guilty.	Guilty.	Disagreement.
366	Sylvester Parham	–	March 10, 1918 (2d degree)	–
1228	Joseph Wakelin	–	Oct. 11, 1917 (manslaughter)	–
1229	Sarah Ann Wakelin	Oct. 11, 1917	–	–
159	Joseph Cordia, *alias* Joseph Cordio	Apr. 12, 1919	–	–
160	Francisco Feci, *alias* Francisco Fece	–	Apr. 12, 1919	–
4475	Lionel Theberge, *alias* Leo Theberge	May 13, 1921	–	–
4474	Emile Theberge	May 13, 1921	–	–
4038	Guiseppe Bonanno	–	Jan. 6, 1921 (2d degree)	–
4114	Rocco Scicchitani	–	Jan. 29, 1921	–
4473	Alfred Fortier, *alias* Alfred Poirier	–	May 13, 1921 (2d degree)	–
4803	Clarence W. Loud	Jan. 26, 1922	–	–
7374	John Bedrosian	–	Nov. 23, 1922 (2d degree)	–
7375	Joseph Rizzo	Nov. 27, 1922	–	–
7519	Mary G. Brady	Dec. 13, 1922[1]	–	–
6407	Salvatore Vona	–	May 19, 1924 (2d degree)	–
9358	Nicola Lupo	Apr. 23, 1924	–	–
9665	Salvatori Letteri	Oct. 11, 1923	–	–
10158	Albert Williams, *alias* Albert Brown	–	May 6, 1924 (2d degree)	–
11675	Raymond D. Thiery	Feb. 9, 1925[1]	–	–
12030	Hallie Mowbray	May 27, 1925	–	–
12672	James L. Mortimer	Feb. 9, 1925[1]	–	–
14482	Richard Stewart, *alias* Frank Johnson	–	Oct. 23, 1925	–
14687	Edward J. Heinlein	–	Nov. 29, 1925	–
14688	Peter V. King	Nov. 29, 1925	–	–
14689	John J. Devereaux	–	Nov. 29, 1915	–
14690	John J. McLaughlin	–	Nov. 29, 1925	–
14699	Gilbert Richards	Oct. 26, 1925[1]	–	–
16787	Charles Henry Slyvert	Sept. 16, 1926[1]	–	–
13217	Bernard McGildrie	Feb. 15, 1926	–	–
15414	Giovanni Ierardi	Feb. 5, 1926	–	–
16073	Carmine LoPriore	June 21, 1926[1]	–	–
14323	Joseph Mailhot	Oct. 10, 1925	–	–
14709	Jerry Gedzium	–	Nov. 24, 1926	–
12088	William C. Moir	Nov. 12, 1926	–	–
16471	George C. Farley	Dec. 3, 1926	–	–

[1] By reason of insanity.

[1] Including jury-waived and equity cases.
[2] Number of days for civil and criminal cases reported as "three days for all classes of cases."
[2] Including equity and divorce cases.

Auditors, Masters and Referees.[1]

Amounts Expended, 1923 to 1926, Inclusive, by Counties.

County.	1923.	1924.	1925.	1926.
Barnstable	$331 03	$62 50	$795 83	$631 23
Berkshire	780 14	1,771 64	1,227 92	1,535 80
Bristol	3,564 17	6,900 70	3,468 36	4,959 28
Dukes	25 00	93 75	15 00	202 71
Essex	12,858 42	14,827 18	15,278 77	13,531 28
Franklin	1,447 50	1,091 66	347 00	1,673 14
Hampden	15,660 24	11,844 64	6,219 79	15,362 85
Hampshire	1,083 33	3,335 71	1,487 18	1,815 21
Middlesex	20,001 17	21,487 87	28,184 55	23,864 70
Nantucket	76 39	8 33	92 50	50 00
Norfolk	3,587 53	3,156 07	4,241 13	4,953 15
Plymouth	3,764 07	4,648 78	5,066 60	8,374 77
Suffolk[2]	80,846 02	68,301 76	94,313 05	53,892 43
Worcester	8,689 38	10,200 26	11,707 43	10,471 07
	$152,714 39	$147,730 85	$172,445 11	$141,317 62

[1] Referees are very seldom appointed. The figures are almost entirely for masters and auditors.

[2] Investigators included 1923 and 1924.

Note. — In Suffolk County these figures apply to the Superior Court (civil) only. In other counties they apply to all courts.

Land Court Statistics, 1906, 1916, 1926.

	1906.	1916.	1926.
Registration cases	347	513	721
Tax lien cases	–[1]	–[1]	393
Miscellaneous cases	104	68	95
Total cases entered	451	581	1,209
Decree plans made	–	481	640
Subdivision plans made	–	279	527
Total plans made	–	760	1,167
Total appropriation	$34,675 00	$64,175 00	$94,050 00
Fees sent State Treasurer	15,933 12	25,588 50	74,194 71
Net cost to Commonwealth	20,560 85	38,578 42	19,645 57
Assurance fund	–	65,210 00	177,082 50
Assessed value of registered land	3,351,770 00	4,851,973 00	13,242,175 00

Total cases in 1916 show 29 per cent increase over 1906.
Total cases in 1926 show 168 per cent increase over 1916.
Total fees received in 1916, 61 per cent increase over 1906.
Total fees received in 1926, 190 per cent increase over 1916.
Total fees received in 1926, 366 per cent increase over 1906.

[1] No tax lien cases until 1917.

Entries in Probate Courts for the Year 1926.

	Probate.[1]	Divorce.
Suffolk	6,346	1,269
Middlesex	5,190	1,061
Essex	3,060	566
Worcester	2,896	491
Norfolk	1,830	249
Bristol	1,808	383
Hampden	1,364	8
Plymouth	1,099	103
Barnstable	432	61
Hampshire	453	40
Berkshire	746	155
Dukes	67	3
Franklin	419	48
Nantucket	65	7
Totals	25,775	4,444

[1] Including insane commitments.

Summary of Civil Business in Municipal Court of City of Boston for the Year 1926.

"Deft. D Clerk" means that defendant was defaulted, under the general rule, by the clerk.
"Deft. D Court" means that defendant was defaulted in court.

	Removed to the District Court of the United States.	Entered.	Removed to Superior Civil Court.	Deft. D. Clerk.		Deft. D. Court.		Ints. Filed.		Marked for —		Trial Lists.				Findings.		Appellate Division.			
				Non-Appearance.	Non-Answer.	Non-Appearance.	Non-Answer.	To Plaintiff.	To Defendant.	Motion List.	Trial List.	Non-Suits.	Defaults.	Tried.	Reserved.	For Plaintiff.	For Defendant.	Requests for Report.	Reports Allowed.	Reports Disallowed.	Petitions to Establish.
Contract	1	24,475	1,256	9,580	94	170	660	308	2,270	–	–	–	–	1,728	591	1,240	522	164	83	17	13
Tort	–	5,485	249	448	10	2	43	914	556	–	–	–	–	1,007	384	512	418	72	29	3	1
All others	–	870	–	263	2	5	4	–	–	–	–	–	–	193	19	160	36	19	4	3	–
Totals	1	30,830	1,505	10,291	106	177	707	1,312	2,826	10,383	21,953	379	3,903	2,928	994	1,912	976	255	116	23	14

Summary of Civil Business in Municipal Court of City of Boston for the Year 1926 — *Concluded.*

	Appellate Division — *Concluded.*											Appealed to Superior Civil Court.	Entered on Non-Suit.	Plaintiffs' Judgments.							Original Executions Issued.	Executions Renewed.
	Reports Proved.	Cases Heard.	Cases Decided.	Affirmed.	Reversed.	Modified.	Entire Re-Trial Ordered.	Partial Re-Trial Ordered.	Motions.	Appeals to Supreme Judicial Court.	Appeals to Supreme Court Judicial Perfected.[1]			Entered on Default.	Entered on Trial — Open Court.	Entered on Trial — After Reservation.	Entered by Agreement.	Total Plaintiffs' Judgments.	Amount of Plffs'. Judgments.	Average Amount of Plaintiffs' Judgments.		
Contract	–	60	63	54	3	–	5	1	15	18	5	–	235	12,602	825	274	2,719	16,420	$2,688,617 06	$163 74	13,994	945
Tort	–	26	19	18	–	–	1	–	2	3	–	–	161	48	402	131	1,820	2,401	284,273 26	118 39	979	10
All others	–	6	3	2	1	–	–	–	–	1	–	13	5	255	104	10	17	386	7,119 60	18 44	361	1
Totals	–	92	85	74	4	–	6	1	17	22	5	13	401	12,905	1,331	415	4,556	19,207	$2,980,009 92	$155 15	15,334	956

[1] From 27 November, 1926, to 31 December, 1926.

Entries over $2,000 ad damnum:

Contract	539
Contract or tort	41
Tort	626
Others	3
Total	1,209

Removals over $2,000 ad damnum:

Contract	154
Contract or tort	2
Tort	48
Total	204

Entries over $2,000 ad damnum from 1 January, 1927, to 1 October, 1927:

Contract	472
Contract or tort	24
Tort	659
Other	1
Total	1,156

Removals over $2,000 ad damnum from 1 January, 1927, to 1 October, 1927:

Contract	108
Tort	28
Other	1
Total	137

Poor Debtor Entries	4,345
Dubuque Process	74

Municipal Court of the City of Boston for Civil Business.

Summary of Small Claims for the Year 1926.

	Actions Entered.	Reported as settled out of Court.	Amount of Plffs'. Claims.	Notices Mailed to Defts.	Notices Returned, Acceptance Refused.	Notices Returned, unable to Locate.	Notices to Plffs.	Counterclaims or Set-offs.	Amount of Counterclaims or Set-offs.	Answers. Defendants.	Answers. Plaintiffs.	Settled in Court before Hearing.	Hearings.	Settled in Court after Hearing.	Reserved.	Dismissals.	Transferred for Trial.	Removed to Superior Court.	Referred to Appellate Division.
Contract . .	1,153	161	$21,794 37	1,207	12	101	17	17	$401 70	380	22	64	302	27	7	11	–	10	–
Tort . . .	98	19	2,290 48	98	–	2	2	2	1,235 00	51	3	4	56	1	1	1	–	–	–
Totals . .	1,251	180	$24,084 85	1,305	12	103	19	19	$1,636 70	431	25	68	358	28	8	12	–	10	–

	Judgments. Entered on Defaults.	Entered on Non-Suits.	Entered on Hearings.	Total Plffs'. Judgments.	Amount, Plffs'. Judgments.	Total Defts.' Judgments.	Amount, Defts'. Judgments.	Judgments vacated.	Neither Party.	Counterclaims dismissed.	Counterclaims disallowed.	Plffs'. Exons. (Original).	Defts'. Exons. (Original).	Plffs'. Alias Exon.
Contract . . .	387	26	287	582	$11,652 01	92	$16 00	–	17	1	7	334	–	5
Tort	6	2	55	42	784 79	19	–	–	–	1	2	15	–	–
Totals . . .	393	28	342	624	$12,436 80	111	$16 00	–	17	2	9	349	–	5

Small-claim entries from 1 January, 1927, to 1 October, 1927:

Contract	725
Tort	52
Total	777

Removed to Superior Court 1 January, 1927, to 1 October, 1927:

Contract	2

AS REPORTED BY THE CLERKS OF SAID COURTS.

Compiled by the Administrative Committee of District Courts.

District Courts	Writs Entered	als, Civil	ovals to S. C.	rted to App. Div.	ealed to S. J. C.	Debt. & Dubiq.	ll Claims	ne	cases begun	n. Appeals	nkenness	rating under inf. of int. or	Auto Cases: l Automobile Cases	liquor cases	ests	enile cases under 17 years
Tort																
Total	82															

District Courts	Civil Writs Enter	Appeals, Civil	Removals to S. C	Reported to App	Appealed to S. J.	Poor Debt. & D	Small Claims	Insane	Crim. cases begun	Crim. Appeals	Drunkenness	Operating under i liquor	Total Automobil	Int. liquor cases	Inquests	Juvenile cases u
Worcester, Central	4700	1	156	5	1	530	848	329	7727	1128	3986	111	1210	234	24	637
Springfield	3121	....	84	12	....	224	1385	149	8583	122	1316	214	1255	384	52	376
Middlesex, First Eastern	3011	2	119	3	....	664	1014	94	4207	120	1669	*....	559	183	34	203
Roxbury	544	....	8	1	....	151	756	2	11759	954	4527	*....	2145	630	17	572
Bristol, Third	1700	....	50	3	....	53	479	102	3678	265	1228	93	516	454	14	516
Middlesex, Third Eastern	2888	5	115	3	1	1375	910	....	10334	795	3872	*....	2093	583	29	251
Dorchester	378	2	5	....	....	379	534	....	4903	217	987	46	2388	105	3	187
Lowell	1505	1	63	5	1	134	713	124	4460	179	2161	97	563	468	37	135
Bristol, Second	1576	....	83	1	....	146	459	94	3840	295	1692	64	321	536	16	231
Essex, Southern	2154	4	146	5	1	362	711	82	4761	255	1664	98	1007	466	23	241
Lawrence	1519	....	95	5	....	151	85	52	3650	220	1969	95	419	235	10	191
Norfolk, Eastern	1855	1	62	1	....	504	666	47	5570	215	1560	199	2525	157	29	178
Somerville	1521	2	48	2	....	456	479	62	3049	290	1427	67	307	370	32	185
West Roxbury	150	....	10	....	....	50	322	....	5127	340	1343	62	2189	221	18	90
Essex, First	850	....	132	....	....	215	260	287	2498	371	780	88	343	201	12	150
Brockton	925	....	60	3	....	121	416	63	2862	203	1316	70	311	199	19	151
East Boston	274	2	9	2	1	102	263	....	5188	157	3176	21	275	216	20	430
Chelsea	584	6	22	....	....	108	348	11	4026	252	1539	89	804	125	20	336
South Boston	198	....	5	....	....	25	169	....	9859	284	5901	66	1002	567	15	301
Essex, Northern Central	597	1	61	1	....	76	200	12	1347	116	635	39	133	76	11	44
Holyoke	551	....	34	....	....	26	272	22	1982	38	771	43	204	146	20	171
Hampshire	433	....	10	3	1	14	392	110	1816	104	621	82	420	213	7	176
Middlesex, Second Eastern	1194	1	36	1	....	142	469	83	3014	164	1190	141	816	146	33	148
Berkshire, Central	507	....	17	2	1	15	576	53	1860	50	707	51	370	167	2	110
Bristol, First	421	2	49	....	....	18	240	105	1648	230	517	64	334	283	18	77
Middlesex, Fourth Eastern	840	....	21	1	....	90	251	11	2209	63	594	*....	1012	109	7	40
Newton	884	....	30	7	1	102	328	47	1572	120	549	80	494	39	16	166
Fitchburg	396	....	15	1	....	9	105	56	1530	88	806	38	218	33	7	67
Norfolk, Northern	528	1	14	....	....	128	71	109	1234	100	394	52	463	34	21	56
Brighton	171	1	....	....	....	63	270	1	2921	136	556	46	890	115	15	86
Franklin, Greenfield	298	....	16	....	....	13	80	44	736	37	164	60	166	44	5	34
Worcester, First Southern	170	....	5	....	....	12	31	11	1024	58	344	59	191	82	2	56
Brookline	953	....	52	3	2	335	247	37	1690	88	337	38	738	22	10	137
Bristol, Fourth	265	....	24	....	....	26	176	....	893	73	254	53	202	71	5	51
Plymouth, Second	323	....	7	....	....	85	294	27	2152	141	589	141	737	97	4	53
Chicopee	336	....	9	....	....	16	44	31	2024	25	390	43	99	184	....	72
Worcester, First Northern	308	....	12	2	1	4	61	46	990	42	275	36	163	69	4	44
Charlestown	95	1	....	....	....	1248	127	....	5296	317	2949	24	654	280	5	152
Middlesex, First Southern	507	....	13	2	....	75	261	34	1216	34	280	56	276	124	6	85
Essex, Eastern	324	....	21	....	....	50	102	19	1012	101	532	20	149	65	5	77
Norfolk, Western	274	....	5	....	....	34	78	80	1178	40	246	43	435	117	16	34
Middlesex, Central	296	....	7	2	....	28	207	20	839	45	230	39	227	96	8	77
Worcester, Second Southern	123	....	10	....	....	2	30	6	639	14	105	33	151	41	2	3
Hampden, Western	98	....	4	....	....	....	124	21	951	19	335	37	172	47	8	39
Berkshire, Northern	134	....	6	2	2	1	33	17	713	8	446	13	64	35	5	7
Marlborough	239	....	6	....	....	22	138	21	653	25	165	20	117	103	9	47
Worcester, Second Eastern	117	[illegible]	11	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Middlesex, Second Eastern	1194	1	36	1	....	142	469	83	3014	164	1190	141	816	146	33	148
Berkshire, Central	507	....	17	2	1	15	576	53	1860	50	707	51	370	167	2	110
Bristol, First	421	2	49	....	....	18	240	105	1648	230	517	64	334	283	18	77
Middlesex, Fourth Eastern	840	....	21	1	....	90	251	11	2209	63	594	*	1012	109	7	40
Newton	884	....	30	7	1	102	328	47	1572	120	549	80	494	39	16	166
Fitchburg	396	....	15	1	....	9	105	56	1530	88	806	38	218	33	7	67
Norfolk, Northern	528	1	14	....	....	128	71	109	1234	100	394	52	463	34	21	56
Brighton	171	1	....	....	....	63	270	1	2921	136	556	46	890	115	15	86
Franklin, Greenfield	298	....	16	....	....	13	80	44	736	37	164	60	166	44	5	34
Worcester, First Southern	170	....	5	....	....	12	31	11	1024	58	344	59	191	82	2	56
Brookline	953	....	52	3	2	335	247	37	1690	88	337	38	738	22	10	137
Bristol, Fourth	265	....	24	....	....	26	176	....	893	73	254	53	202	71	5	51
Plymouth, Second	323	....	7	....	....	85	294	27	2152	141	589	141	737	97	4	53
Chicopee	336	....	9	....	....	16	44	31	2024	25	390	43	99	184	....	72
Worcester, First Northern	308	....	12	2	1	4	61	46	990	42	275	36	163	69	4	44
Charlestown	95	1	....	....	....	1248	127	....	5296	317	2949	24	654	280	5	152
Middlesex, First Southern	507	....	13	2	....	75	261	34	1216	34	280	56	276	124	6	85
Essex, Eastern	324	....	21	....	....	50	102	19	1012	101	532	20	149	65	5	77
Norfolk, Western	274	....	5	....	....	34	78	80	1178	40	246	43	435	117	16	34
Middlesex, Central	296	....	7	2	....	28	207	20	859	45	230	39	227	96	8	77
Worcester, Second Southern	123	....	10	....	....	2	30	6	639	14	105	33	151	41	2	3
Hampden, Western	98	....	4	....	....	....	124	21	951	19	335	37	172	47	8	39
Berkshire, Northern	134	....	6	2	2	1	33	17	713	8	446	13	64	35	5	7
Marlborough	239	....	6	....	....	22	138	21	653	25	165	20	117	103	9	47
Worcester, Second Eastern	117	....	11	....	....	3	72	34	627	36	180	33	160	31	6	27
Newburyport	245	....	4	....	....	24	112	13	619	62	182	32	110	58	5	39
Plymouth, Third	148	....	11	....	....	29	205	18	657	44	141	38	163	75	6	35
Peabody	278	....	19	....	....	25	86	12	1235	59	478	25	148	144	5	96
Leominster	185	....	3	....	....	8	35	16	619	28	250	36	157	51	4	53
Worcester, Western	81	....	3	....	....	10	95	....	620	57	103	23	153	44	6	29
Worcester, Third Southern	125	....	3	....	....	15	74	18	413	24	104	24	75	42	4	14
Hampden, Eastern	92	....	4	....	....	2	4	17	637	40	139	30	188	40	8	17
Plymouth, Fourth	126	....	1	....	....	8	71	58	911	17	191	48	323	41	5	41
Norfolk, Southern	164	....	7	....	....	39	24	11	556	64	137	26	155	29	4	30
Middlesex, First Northern	90	....	....	....	....	5	73	6	646	24	59	11	141	96	5	17
Worcester, First Eastern	66	....	4	....	....	6	33	11	590	23	63	18	83	11	7	4
Berkshire, Fourth	73	....	2	....	....	4	83	....	399	9	125	*	81	16	....	21
Essex, Second	93	....	7	....	....	1	67	15	755	50	145	38	277	95	4	26
Barnstable, First	135	....	1	1	....	28	300	5	856	40	135	79	181	40	10	12
[illegible]	105					26	107	8	894	14	23	6	56	49	5	18

Norfolk, Southern															
Middlesex, First Northern	90	....	....	....	....	5	73	6	646	24	59	11	141	96	5	17
Worcester, First Eastern	66	....	4	....	....	6	33	11	590	23	63	18	83	11	7	4
Berkshire, Fourth	73	....	2	....	....	4	83	....	399	9	125	*....	81	16	....	21
Essex, Second	93	....	7	....	....	1	67	15	755	50	145	38	277	95	4	26
Barnstable, First	135	....	1	1	....	28	300	5	856	40	135	79	181	40	10	12
Barnstable, Second	105	....	....	....	....	26	107	8	294	14	23	6	56	49	5	18
Berkshire, Southern	89	....	5	2	....	....	184	10	292	7	67	14	89	30	7	16
Natick	151	....	6	....	....	13	104	11	447	6	134	20	162	12	2	34
Lee	27	....	3	1	....	....	128	6	356	16	59	20	103	61	4	3
Hampshire, Eastern	28	....	....	....	....	3	10	8	169	2	37	7	17	51	....	14
Franklin, Eastern	29	....	3	....	....	....	31	7	139	3	13	5	22	40	2	2
Essex, Third	37	....	....	....	....	8	13	2	273	6	127	21	43	15	5	10
Winchendon	39	....	....	....	....	1	17	8	177	4	56	11	27	13	....	9
Dukes County	41	....	....	....	....	7	157	3	205	13	41	4	64	25	1	7
Williamstown	7	....	....	....	....	....	15	5	67	4	20	5	22	10	....	12
Nantucket	5	....	....	....	....	1	55	....	169	5	29	8	60	26	....	28
	43294	33	1853	82	13	8650	18179	3799	161809	9595	60132	3413	45888	10317	780	8084

*Not reported separately

Grand Total of all Cases, 375,921

Criminal Cases before Trial Justices for the Year September 30, 1926, to September 30, 1927.

[There are in the Commonwealth ten trial justices — five in Essex County, one in Hampden, two in Middlesex and two in Worcester.]

	Brought during Year.	Appealed.	Bound Over for Grand Jury.
Charles J. Stone, Andover	163	6	–
Moses S. Case, Marblehead	224	7	3
Walter H. Southwick, Nahant	342	3	1
Wm. E. Ludden, Saugus	446	4	–
Cornelius J. Mahoney, North Andover	110	5	–
Geo. B. Haas, Ludlow	516	3	3
Daniel J. Riley, Hopkinton	43	–	–
Fred E. Morris, Hudson	190	9	–
John L. Smith, Barre	57	2	–
Dennis Healy, Hardwick	96	–	–
Totals	2,187	39	7

COPY OF DOCKET ENTRIES IN SACCO-VANZETTI CASE.

GRAND JURY CASE

Docket No. 5545
Record Vol. — Page —

Indictment returned Sept. 11, 1920.

Attorneys for deft.	COMMONWEALTH	Offence — Murder
Fred H. Moore	vs.	Committed at
Wm. J. Callahan	NICOLA SACCO — BARTOLOMEO VANZETTI	Braintree —
J. J. & T. F. McAnarney		April 15, 1920.

1920	Sept	8	Motion to impound exhibit (Buick car.)
"	"	11	Indictment returned.
"	"	28	Habeas issued to State Prison for deft. Vanzetti.
"	"	"	Defendants arraigned. Each pleads not guilty.
"	"	"	Vanzetti remanded to State Prison without bail.
"	"	"	Sacco remanded to custody of Sheriff without bail.
"	Nov.	18	Appearance of Fred H. Moore and Wm. J. Callahan for defendants.
1921	Feb.	5	Order for special sitting beginning Monday March 7, 1921 for trial together of the two cases, Nos. 5545 and 5546, and that venires issue for 500 jurors.
"	"	14	Venires issued for 500 jurors to attend Monday March 7.
"	"	18	Return by sheriff of notice of special sitting.
"	"	23	Defendants motion for continuance filed.
"	"	26	Assignment for trial on March 7, vacated: motion to continue impounded.
"	"	28	Motion of defendants for continuance to May 31 and waiver of right to be admitted to bail prior to or during a full trial.
"	"	"	Notice to excuse those summoned as jurors.
"	Apr.	20	Order for special sitting beginning Tuesday, May 31, 1921, and order for issue of venires for 500 jurors.
"	"	25	Order fixing dates for attendance of jurors.
"	May	12	Venires issued, 175 to attend May 31, 175, June 1, and 150 June 2.
"	"	27	Habeas for defendant Vanzetti.
"	"	31	Sitting opened; Defendants placed on trial.
"	"	31	Appearance of J. J. & T. F. McAnarney for Vanzetti.
"	"	"	Motion of Sacco for separate trial.
"	"	"	Demand of each deft. for bill of particulars.
"	"	"	Demurrer of each defendant.
"	June	2	Order that Sheriff summon 200 talesmen to attend June 3.
"	"	3	Oral motion of defendants to challenge array of talesmen denied.
"	"	4	Jury sworn.
"	"	6	Defendants' motion for separate trial denied; each deft. excepts.
"	"	6	On motion of defts. that weapons and bullets be admitted for expert examination, the court orders that they be given into the custody of the sheriff for such examination but under no circumstances to go out of his custody.
"	"	6	Waiver of each deft. of any right to accompany jury on view. Both sides request that view be taken. Walter H. Ripley appointed foreman of jury.
"	"	14	Deposition of Guiseppe Adrower opened and delivered to counsel for deft.
"	"	16	Motion for view of car allowed.
"	"	"	Waiver by defts. of right to accompany jury on view of car. Car impounded and placed in custody of sheriff.
"	"	29	Deposition of Adrower presented for filing.
"	July	1	Deposition of Adrower filed by leave of Court.
"	"	6	Waiver of defts. of right to view "Boda" Overland car.
"	"	8	Motion of Vanzetti for severance of trial.
"	"	14	Motion of defendant Sacco for verdict of not guilty, filed and denied.
"	"	"	Motion of defendant Vanzetti for verdict of not guilty filed and denied.

1921	July	14	Verdict: Each defendant guilty of murder in the first degree.
"	"	"	Time for filing defendants' exceptions extended to and including Nov. 1, 1921, with consent of District Attorney.
1921	July	18	Motion of Nicola Sacco for a new trial.
"	"	"	" " Bartolomeo Vanzetti for a new trial.
"	Oct	31	Deft's. motion to extend time for filing exceptions.
"	"	31	Order on motion extending time for filing exceptions to and including Dec. 1, 1921.
"	Nov.	8	Supplementary motion for new trial.
"	"	30	Motion to extend time for filing exceptions
"	"	"	Order on motion ext. time for filing exceptions to and including Dec. 20, 1921.
"	Dec.	17	Order on motion to extend time for filing exceptions to Jan. 15, 1922.
"	"	24	Affidavit of Sacco & Vanzetti
"	"	"	Affidavit of J. J. & T. F. McAnarney
"	"	"	" " Fred H. Moore and Wm. J. Callahan
"	"	"	Decision on motions for new trial.
"	"	27	Time for filing exceptions to and appeal from order denying motions for new trial extended to and including Jan. 14, 1922.
1922	Jan.	13	Motion of Sacco to extend time for filing exceptions to Jan. 24, allowed
"	"	"	Motion of Vanzetti to extend time for filing exceptions to Jan. 24, allowed.
"	"	"	Motion of Sacco to extend time for filing exceptions & appeal to Jan. 24, allowed
"	"	"	Motion of Vanzetti to extend time for filing exceptions and appeal to Jan. 24, allowed.
"	"	23	Order allowing defendants examination of Buick car.
"	"	24	Mo. of Sacco to extend time for filing exceptions & appeal to and including Feb 10th allowed.
"	"	"	Mo. of Vanzetti to extend time for filing exceptions & appeal to and including Feb. 10th allowed.
"	Feb.	10	Bill of exceptions of Deft. Nicola Sacco (Vol. 1)
"	"	"	Bill of exceptions of deft. Bartolomeo Vanzetti. (Vol. 1)
"	"	"	Order extending time for filing of completed bill of exceptions of deft, Sacco, to and including Feb. 20, 1922.
"	"	"	Order extending time for filing of completed bill of exceptions of deft, Vanzetti to and including Feb. 20, 1922.
"	"	20	Order extending time for filing of completed bill of exceptions of deft. Sacco to and including Feb. 25, 1922.
"	"	"	Order extending time for filing of completed bill of exceptions of deft. Vanzetti to and including Feb. 25, 1922.
"	"	25	Bill of exceptions, Sacco, Vol. II
"	"	"	Bill of exceptions, Vanzetti, Vol. II
"	May	4	Second supplementary motion for new trial of Nicola Sacco
"	July	22	Third supplementary motion for new trial of Nicola Sacco
"	Sept.	11	Fourth supplementary motion for new trial.
1923	Mar.	7	Affidavit of Lewis McHardy and 10 others
"	"	"	" " Louis Pelser
"	"	"	" " Jeremiah F. Gallivan
"	"	"	" " Erastus C. Whitney
"	"	"	" " Charles W. Knappenberg
"	"	"	" " J. Hunter Black
"	"	"	" " Ethel W. Lee
"	"	"	" " Wm. R. Corbett
"	"	"	" " William Mann
"	"	"	" " Robert A. Cony
"	"	"	" " Lola R. Andrews
"	"	8	" " Frederick G. Katzmann
"	"	8	" " Harold P. Williams
"	"	8	" " Frederick G. Katzmann

1923	Mar.	8	Affidavit of Harold P. Williams
"	"	8	" " Michael E. Stewart
"	"	8	" " Martin J. Barrett
1923	Mar.	8	Affidavit of Wm. E. Gray
"	"	8	" " Albert L. Brouillard
"	"	8	Habeas corpus to State Prison for Vanzetti
"	"	9	Motion of Dist. Atty. for appointment of Assistant.
"	"	9	Frederick G. Katzmann, appointed, oath taken and subscribed (Deft's. exceptions saved)
"	"	9	Deft's. exceptions to refusal of court to rule on admission of certain statements in affidavit of J. J. McAnarney.
"	"	"	Adjournment to March 16.
"	"	14	Habeas corpus to State prison for Vanzetti
"	"	16	Bill of exceptions of deft. Sacco on 1st supplementary mo. for new trial.
"	"	"	Bill of exceptions of deft. Vanzetti on 1st Supplementary mo. for new trial
"	"	"	Appearance of Wm. G. Thompson and Arthur D. Hill, specially for the purpose of arguing mo. for new trial based on alleged misconduct of juror Ripley and others.
"	"	"	Dr. Cahoon of Medfield State Hospital and Dr. Thomas of Foxboro State Hospital appointed by court to examine deft. Sacco as to his mental condition and to report to the court on Sat. A. M.
"	"	17	Deft. Sacco ordered committed to Boston Psychopathic Hospital for care and observation pending determination of his insanity till and including March 31st, the Director of said Hospital to make written report of condition of said Sacco on Tuesday March 27, 1923, to presiding Justice, to the Dist. Atty. and to counsel for said Sacco.
"	"	17	On Mo. of counsel, A. D. Hill, Esq., supplementary mo. for new trial based on conduct of jurors continued.
"	April	16	Affidavit of Albert H. Hamilton filed
"	"	19	Order as to photographing exhibits.
"	"	20	Order for commitment of deft. Sacco to Bridgewater State Hosp.
"	"	23	Warrant for commitment to Bridgewater State Hospital
"	"	30	Fifth supplementary motion for new trial of Bartolomeo Vanzetti.
"	"	30	Motion of Bartolomeo Vanzetti for leave to photograph exhibits in support of his fifth supplementary motion.
"	"	30	On motion of Asst. Dist. Atty. (Mr. Keith) seconded by counsel for defence all pending motions ordered continued generally because of illness of Mr. Williams, Dist. Atty.
"	Sept.	26	Affidavit of Gwendolyn S. Beamish in support of 2nd supp. mo. for new trial
"	"	"	Affidavit of Frank J. Burke
"	"	"	" " Edward P. Burke in support of 2nd supp. mo. for new trial
"	"	"	Affidavit of John J. Heaney
"	"	"	" " Roy E. Gould
"	"	"	" " Thomas Doyle
"	"	"	" " Thomas Doyle
"	"	"	" " Wilbur F. Turner in support of 1st supp. mo. for new trial
"	"	"	Affidavit of Wilbur F. Turner in support of 5th supp. mo. for new trial
"	"	"	Affidavit of Wilbur F. Turner " " " " " " " " " (Book)
"	"	"	Affidavit of Albert H. Hamilton in support of 1st supp. mo.
"	"	29	Habeas for deft. Vanzetti
"	Oct.	1	Affidavit of Charles Van Amburgh
"	"	"	" " Wm. E. Hingston
"	"	"	" " Jos. W. Keith
"	"	1	Supplement to First Supp. mo. for new trial
"	"	3	Second supp. affidavit of Albert H. Hamilton in support of first supp. mo.
"	"	16	Affidavit of Augustus H. Gill, in support of 5th supp. mo for new trial
"	"	16	Affidavit of Albert H. Hamilton
1923–	Oct.	20	Habeas for Deft. Vanzetti
"	"	22	Affidavit of William H. Proctor

1923–Oct.	23	Supp. affidavit of Albert H. Hamilton & Supp. Album of Photographs to supp. affidavit.
"	" 23	Affidavit of Marjory L. & Ethel W. Lee
"	" 23	" " Robt. Reed in support of 4th Supp. Motion
"	" 23	" " Fred H. Moore in " " " " " "
"	" 23	19 Affidavits, reports of interviews &c put in by defence and ord. impounded.
"	" 24	Supplementary affidavit of August H. Gill
"	" 24	2nd " " " Albert H. Hamilton
"	" 25	Affidavit of Charles J. Van Amburgh
"	" 25	Photographic exhibits
"	" 26	Album (with 2nd supp. affidavit of A. H. Hamilton)
"	" 29	Supp. affidavit of Charles J. VanAmburgh
"	" 29	Affidavit of Merton A. Robinson
"	" 29	Supp. " " " " "
"	" 29	Affidavit of Nils Ekman (with 24 photos 1–12 A–L)
"	" 31	Affidavit of F. G. Katzmann (5th supp. mo.)
"	" 31	" " H. P. Williams (" " ")
"	Nov. 5	Deft's. supp. motion for new trial.
"	" 12	2nd supp. affidavit of C. J. VanAmburg to 5th supp. mo for new trial
"	Dec. 7	Supp. affidavit of Albert H. Hamilton
1924–Mar.	25	Decision — In re substitution of gun barrels
"	" 27	Defts'. appeal to S. J. C. from decision of date Mar. 25, 1924.
"	" 27	Deft's. notice to Dist. Atty. of appeal from decision
"	" 27	Mo. of deft. Sacco for ext. of time for filing exceptions in connection with Court's decision: Dist. Atty's assent, — time ext. to April 12, 1924.
"	" 27	Mo. of deft. Vanzetti for ext. of time for filing excep. in connection with court's decision: Dist. Atty's. assent, — time ext. to April 12, 1924.
"	Apr. 5	Deft's. claim of exceptions.
"	Oct. 1	Decision on deft's. requests for rulings on 1st supp. mo. for new trial.
"	" "	Decision on deft's. requests for rulings on 5th supp. mo. for new trial.
"	" 1	Memo. & decision denying 1st supp. (Ripley) mo. for new trial
"	" 1	" " " " 2nd " Mo. for new trial (Gould affidavit)
"	" 1	" " " " " " " " " " (Pelser "
"	" 1	" " " " 3rd " (Goodridge) Mo. for new trial
"	" 1	" " " " 4th " (Andrews) " " " "
"	" 1	" " " " 5th " Mo. for new trial (Hamilton aff.)
"	" 1	" " " " 5th " " " " " " (Proctor affidavit)
"	" 1	Order ext. time for claiming, saving or filing excep. on mo. for new trial until Oct. 8, 1924.
"	" 2	Defts. exceptions allowed.
"	" 4	Deft's appeal
"	" 7	Order ext. time for claiming, saving or filing except. to & including Oct. 15, 1924.
"	" 11	Ord. ext. time for filing claim of excep. & bill of excep. to and including Nov. 7, 1924.
"	" 21	Deft's. claim of exceptions
"	" "	Supplementary appeal
"	" "	Ord. ext. time for filing claim of excep. & Bill of excep. to and including Oct. 23, 1924.
"	" 23	Withdrawal of appearance of Arthur D. Hill
"	" "	Ord. ext. time for filing claim of excep. & Bill of excep. to Nov. 7, 1924.
1924–Oct.	28	Appearance of Richard H. Wiswall for defts.
"	" 29	Deft's. substituted claim of exceptions
"	Nov. 3	Defts. further claim of exceptions
"	" 7	Ord. ext. time for filing claim of excep. and bill of excep. to and including Nov. 21, 1924.
"	" 8	Withdrawal of appearance of Fred H. Moore.
"	" 19	Defts' supplementary bill of exceptions.
"	" 21	Motion of defts. to extend time for filing claim and bill of exceptions to memo. and decisions denying 2nd, 3rd, and 4th supp. motions for new trial.

1924–Nov.	21	Order ext. time for filing claim and bill of exceptions on 2nd, third, and 4th supp. motions for new trial to and including Dec. 1, 1924.
" Nov.	25	Appearance of Wm. G. Thompson for defendant Sacco.
" "	25	" " " " " " " Vanzetti.
" "	26	Defendants claim of exceptions.
" Dec.	1	Defendant's bill of exceptions to decision on 2nd supplementary motion for new trial.
" "	9	Withdrawal of appearance of J. J. and T. F. McAnarney for deft. Vanzetti.
1925–Mar.	21	Substitute bill of exceptions of deft. Vanzetti on First supp; motion for new trial.
1925 May	11	Correction of errors & omissions in Bill of Excep. allowed Sept. 13, 1924 & printed, but not yet entered in the S. J. C.
" May	11	Sub. bill of excep. of Bartolomeo Vanzetti on first supp. mo. for new trial filed Mar. 21, 1925, allowed in new draft.
" "	11	Defts. bill of excep. to decision on 2d supp. mo. for new trial filed Dec. 1, 1924, allowed.
" "	11	Defts. supp. bill of excep. filed Nov. 19, 1924, based on denial of 1st and 5th supp. motions for new trial, allowed.
" Nov.	10	Correction of original Bill of Exceptions
1926–May	13	Rescript received: "Exceptions overruled. Verdict to stand."
" "	26	Motion to impound filed and allowed
" "	"	Motion for new trial
" "	"	Affidavit of William G. Thompson
" "	"	" " James F. Weeks
" "	"	" " J. J. McAnarney
" "	"	" " Nicola Sacco
" "	"	" " Amleto Fabri
" "	28	" " Wm. G. Thompson
" June	10	" " Herbert B. Caffrey
" "	"	" " Celestino F. Madeiros
" "	"	" " Edward G. Lennon
" "	11	" " Henry E. Connors
" "	"	" " Edward J. Noone
" "	"	" " Ellsworth C. Jacobs
" "	"	" " John T. McKay
" "	"	" " John S. Mendonca & Elwin H. Hauver
" "	"	" " Peter C. Cannon
" "	"	Interrog. of James F. Weeks at State Prison May 27, 1926 by Wm. G. Thompson
" "	12	Affidavit of John J. Richards
" "	"	" " Herbert B. Ehrmann
" "	15	Motion (filed by Comlth.) for termination of time in which defts. may file affidavits in support of motion for new trial.
" "	17	Mo. filed by Com. June 15, 1926, allowed
" "	16	Affidavit of Herbert B. Ehrmann and John J. Richards
" "	17	" " Herbert B. Ehrmann
" "	21	" " Mrs. Mary Matthews
" "	"	" " John T. McKay
" "	"	" " Oliver J. Curtis (with exhibit "A")
" "	"	" " Henry A. Plett
" "	"	" " John P Hanley
1926–June	21	Affidavit of Albert C. Thomas
" "	"	Affidavit of Elisha H. Cohoon
" "	"	" " Charles E. Linscott
" "	"	" " William P. Kelley
" "	"	" " Dudley P. Ranney
" "	"	" " Winfield M. Wilbar & Dudley P. Ranney
" "	"	" " Michael F. Fleming
" "	"	" " Albert C. Crocker

1926–June	21	Affidavit of	Samuel H. Capen
"	"	"	" Michael F. Fleming
"	"	"	" Arthur D. Timmins
"	"	"	" Dudley P. Ranney
"	"	18	Deft's. memorandum on motion to limit time for filing affidavits in support of mo. for new trial and order of court limiting such time to June 30, 1926.
"	"	25	Affidavit of Lester S. Cornell
"	"	"	" Rubin Galkin
"	"	"	" Charles E. Linscott
"	"	"	" Charles E. Linscott
"	"	26	" Herbert B. Ehrmann
"	"	"	" Albert L. Carpenter
"	"	25	Mo. of deft. to further extend time &c from June 30 to July 8, filed & allowed with consent of Dist. Atty.
"	"	28	Appearance of Herbert B. Ehrmann for defendants
"	"	29	Affidavit of Dudley P. Ranney
"	"	30	" Lewis L. Wade
"	"	"	" John F. Carney
"	July	1	" Barney B. Monterio
"	"	"	" May B. Monterio
"	"	"	" Patrick J. McGovern
"	"	"	" Nicola Sacco
"	"	"	" Frank J. Burke
"	"	2	" Joseph Morell
"	"	3	" Edward J. Miller
"	"	3	" Daniel E. Geary
"	"	3	" John Ruzzamenti
"	"	3	" Fred J. Weyand
"	"	7	" Edward J. Noons
"	"	8	" Mary Splaine Williams
"	"	"	Defts. mo. to further extend time for filing affidavits from July 8 to July 16 filed and allowed with consent of Dist. Atty.
"	"	"	Deposition of Celestino Madeiros
"	"	9	Affidavit of Pauline Gray
"	"	"	" Pasquale Morrelli
"	"	"	" Louise Kelly
"	"	"	" Nellie Gannon
"	July	9	Affidavit of Minnie Kennedy
"	"	"	" Lawrence Letherman
"	"	10	" John J. Richards & Wm. J. Carroll
"	"	13	" Michael Franklin
"	"	15	" Herbert B. Ehrmann
"	"	"	" Chester H. Goward
"	"	"	" Herbert C. Dow
"	"	"	" Harvey A. Baker
"	"	16	" Alice Peckham
"	"	"	" Patrick J. Pyne
"	"	"	" John J. Richards
"	"	"	" Wm. G. Thompson
"	"	"	" F. G. Katzmann
"	"	"	" Michael E. Stewart
"	"	"	Stipulation
"	"	19	Affidavit of Wm. G. Thompson, filed by consent of Dist. Atty.
"	"	22	" Henry Epstein " " "
"	"	"	" N. O. Simard " " "
1926–July		22	Affidavit of Donato Dibona filed by consent
"	"	"	" Thomas Theodore Driver " "
"	"	"	supp. " " Thomas Theodore Driver " "
"	"	24	Affidavit of Robert C. Karnes filed by Comlth.

1926–July	27	Affidavit of Charles J. VanAmburgh by Comlth.
"	"	"	" " Dudley P. Ranney " "
"	"	30	" " James E. Burns, filed by consent of Dist. Atty.
"	Sept.	13	" " Lincoln Wadsworth filed by defence
"	"	"	" " George Hatton
"	"	"	Statement of June 10, 1926 by Dudley P. Ranney to Wm. G. Thompson
"	"	"	Copy of letter Wm. G. Thompson to U. S. Atty. Gen.
"	"	14	Telegram to Wm. G. Thompson to B. J. Day, Commr.
"	"	"	Record of Madeiros from Bristol Superior Court.
"	"	15	Stenographic report of Dr. Cohoon & Dr. Thomas interview with Madeiros on Apr. 8, 1926.
"	"	"	Defts. requests for rulings
"	"	17	Copy of letter Thompson to Ranney
"	Oct.	9	Affidavit of Wm. G. Thompson filed by consent of Dist. Atty.
"	"	23	Decision denying motion for new trial
"	"	"	Rulings on defendant's exceptions.
"	"	25	Defendants' claim of exceptions
"	"	"	Defts. mo. for ext. of time for filing bill of exceptions until noon of Sat. Oct. 30, 1926 filed and allowed by the court with consent of Dist. Atty.
"	"	26	Defts. additional claim of exceptions.
"	"	28	Defts. bill of exceptions.
"	Nov.	4	Defts. motion to amend bill of exceptions.
"	"	13	" " " " " " " allowed.
"	"	"	" amended bill of exceptions allowed.
1927–Apr.		6	Rescript received "Exceptions overruled."
"	"	8	Habeas (Vanzetti)
"	"	9	Return of service of habeas.
"	"	9	Sacco — sentenced to suffer punishment of death within week beginning July 10, 1927.
"	"	"	Vanzetti — sentenced to suffer punishment of death within week beginning July 10, 1927.
"	"	26	Certified copy of record of conviction and sentence delivered to the Governor.
"	"	"	Warrants for execution made out, signed and delivered to Sheriff.
"	"	"	Copies of Warrants transmitted to Warden of State Prison.
"	Aug.	6	Appearance of Arthur D. Hill for defts.
"	"	6	Defts'. mo. to revoke sentence and for new trial
"	"	6	Affidavit of Elias Field John Nicholas Beffel Herbert B. Ehrmann " " " Robert Benchley Eliz. R. Bernkopf Lois B. Rantoul
"	"	8	Motion to revoke sentence and for new trial denied as to prayer for new trial.
"	"	9	Denial of mo. for revocation of sentence and stay of execution.
"	"	10	Same
"	"	10	Copy of warrant for respite of execution of Sacco to August 10, 1927.
"	"	10	Copy of warrant for respite of execution of Vanzetti to August 10, 1927.
1927	Aug.	11	Defts. exceptions filed
"	"	11	Defts. exceptions allowed
"	"	13	Copy of warrant for respite of execution of Sacco to Aug. 22, 1927.
"	"	13	Copy of warrant for respite of execution of Vanzetti to Aug. 22, 1927.
"	"	20	Rescript received — "Exceptions overruled".

A True Copy of Docket Entries.
Attest:

WILLARD E. EVERETT,
Asst. Clerk.

APPENDIX D.

CRIMINAL TRIALS WITHOUT A JURY IN CONNECTICUT.

WILLIAM M. MALTBIE.[1]

(Reprinted from the Journal of the American Institute of Criminal Law and Criminology.)

In 1921, the legislature of Connecticut passed a law, the second section of which provides as follows:

> In all criminal causes, prosecutions and proceedings the party accused may, if he so elect when called upon to plead, be tried by the court instead of by the jury; and in such cases the court shall have jurisdiction to hear and try such cause and render judgment and sentence thereon.[2]

Aside from the fact that Connecticut thereby became one of the few states which permit those accused of crime of whatever degree to waive the customary trial by jury and to elect a trial to the court, somewhat of interest is added by reason of the circumstance that Connecticut once before tried the experiment of such a law, and quickly repealed it. In 1874, with little debate or comment, the legislature passed a statute in terms similar to that of 1921 quoted above, but in 1878, with considerable debate and some little feeling, repealed it.[3] The burden of attack upon the law was borne by Hon. Charles B. Andrews, who was then a member of the House of Representatives, but who the next year was elected governor of the state, and upon the conclusion of two terms in that office, was appointed to the bench of the Superior Court, and subsequently to that of the Supreme Court of Errors, where he served as chief justice from 1889 to 1901. That in his argument he spoke the minds of the judges there is every reason to believe, both from his position and associations and from certain contemporaneous circumstances. There was then pending a notorious prosecution against three men who in an attempt to escape from the State Prison had killed a watchman, and of whom two had elected trial by the court and one trial by the jury. The trial of the latter had been commenced about the time the repeal bill came before the legislature for action, and a mistrial had come about due to the misconduct of one of the jurors. According to the practice then existing, two judges had presided at the trial, one of whom was Judge Carpenter; and several

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[1] Justice of the Supreme Court of Errors, Hartford, Conn.

[2] Public Acts of 1921, Chap. 267.

[3] Enacted, Public Acts of 1874, Chap. LVI; repealed, Public Acts of 1878, Chap. LXII.

others had been called into consultation on the case, so that it is highly probable that the situation growing out of the choice of different modes of trial by the accused, and the possibility of varying results, was canvassed. Moreover, in State *v.* Worden, 46 Conn. 349, which came to the Supreme Court after the repeal of the law, but had been tried under it, and so involved its constitutionality, Judge Carpenter wrote the opinion. In the course of it, he said:

> That the law is impolitic and unwise, especially in its application to capital cases and felonies generally, we are ready to concede to the fullest extent. We cannot believe that it is wise or expedient to place the life or liberty of any person accused of crime, even by his own consent, at the disposal of any one man or two men, so long as man is a fallible being. But that is a question for the legislature, and the legislature has reconsidered the matter, and very properly repealed the obnoxious law.

Judge Andrews' argument against the law, as it appears in a brief but apparently accurate report in the "Hartford Courant" of the next morning, was that it was probably unconstitutional; that it was designed to aid criminals and fathered by those interested in helping their escape from punishment; that a "most unseemly spectacle" might come about from varying results where two jointly accused of crime elected trial by differing methods; that after all, judges are not as sound triers of the issues of fact presented in criminal cases as are juries, and are apt "to be led away from strict justice by some subtle technicality of law raised by counsel for the accused"; and, "in closing he spoke of the tragedy at the State Prison resulting in the death of a watchman and said that the chief opposition to the (repealing) bill came from the counsel for the murderers." One suspects that he closed with a decided *argumentum ad hominem*, and that portion of his argument may be disregarded. So, too, the constitutionality of the law has been established for Connecticut, and it is not the purpose of the present article to discuss it.[1] Judge Andrews' other arguments do

[1] State *v.* Rankin, 102 Conn. 46, 127 Atl. 916, following State *v.* Worden, 46 Conn. 349. To the same effect, Edwards *v.* State, 45 N. J. L. 419; State *v.* Stevens, 84 N. J. L. 561, 87 Atl. 118; Wartner *v.* State, 102 Ind. 51, 1 N. E. 65; and see the very interesting arguments of F. W. Grinnell, VIII Mass. Law Quar. 7, and IX *id.* 53 and 61, and a note, XXI Harvard Law Rev. 212. It must be confessed that the weight of authority is decidedly opposed to the right of an accused to waive a jury at least in cases more serious than misdemeanors. Freeman *v.* United States (C. C. A.), 227 Fed. 732; Coates *v.* United States (C. C. A.) 290 Fed. 134; Paulsen *v.* People, 195 Ill. 507, 63 N. E. 144; State *v.* Williams, 195 Iowa, 374, 191 N. W. 790, following State *v.* Carman, 63 Iowa, 130, 18 N. W. 691; State *v.* Hataway, 153 La. 751, 96 So. 556; Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635; Michaelson *v.* Beemer, 72 Neb. 761, 101 N. W. 1007; People *v.* Cosmo, 205 N. Y. 91, 98 N. E. 408; State *v.* Pulliam, 184 N. C. 681, 114 S. E. 394; State *v.* Smith, 184 Wis. 664, 200 N. W. 638. In Maryland the practice of waiving juries is very old and antedated statutory authority. See interesting articles by the Honorable Carroll I. Bond, Annapolis, Maryland, VI Mass. Law Quar. 89 and XI Amer. Bar Assn. Journal, 699.

afford a starting point from which to consider the working of the present law during the four years it has been in effect. There is, of course, no way by which any accurate tests may be applied, and so, aside from determining the relative percentages of verdicts of guilty in cases tried to the court and those tried to the jury, the method adopted was to send a questionnaire to the judges of the courts where the law is being used, to prosecutors and public defenders in those courts, and to a considerable number of attorneys who either practice in the criminal courts or might be supposed to be interested in and informed as to the actual operation of the law.

Before taking up Judge Andrews' arguments, however, it is perhaps best to follow the practice of the newspaper reporter, who sums up his story in his opening paragraph. The last question asked was: Would you favor a continuance of the system established by the law in question? To that the answers were surprising in their approach to unanimity. Of the judges, all favored a continuance of the system, although five would prefer that capital cases should be excepted, and one would also except most cases of felony. Of the prosecutors, eight were unqualifiedly favorable to the new order, two favored its continuance until it had had a more thorough trial, and two were opposed to it. Of the public defenders, all favored a continuance of the system, although one suggested a limitation to offenses where the penalty fixed by statute did not exceed five years. Of the attorneys, seventy-nine favored the new order, three thought it ought to be modified as regards trials for murder, and three were opposed to it; of the latter, however, two may properly be said to have an unusual bent for and leaning toward trials before juries in both civil and criminal cases.

To return to Judge Andrews' argument against the law, he stated that it was designed to favor the accused. Some indication of the soundness of that statement may be found in a comparison of the results of criminal trials with and without a jury. During the period since the law went into effect, the statistics at hand show with substantial accuracy that in 316 trials with a jury, there were 242 convictions, or 76 per cent, and in the same period and in the same courts, in 483 trials without a jury, there were 357 convictions, or 74 per cent. In only one court did the percentage of convictions in the latter class of cases fall substantially below that where trials were had with a jury, and there the state's attorney is remarkably successful in jury trials, whether in civil or criminal cases. As the effect of the law is to give the accused an option as to the nature of the tribunal which will try him, it would seem almost self-evident that the law was, if not unduly advantageous, at least advantageous, to him, yet five of those who replied to the questionnaire denied this. The rest, however, with great unanimity, asserted its advantage to the accused, and

many specified the particular kinds of cases in which that was peculiarly so, although, sooth to say, after reading over the various kinds of offenses named, one cannot but wonder a little if there was not approximate accuracy in the reply of those who said that they could not distinguish any class of cases in which the system had peculiar value. However, as would be expected, many felt that there was a great gain to the accused in a trial without a jury in cases where the nature or circumstances of the offense, or a series of offenses of one kind, had aroused public clamor and been given much newspaper publicity; or where the crime alleged was such as to cause an instinctive revolt in the minds of the jury, as sexual offenses against young girls; or where there was something in the past life, reputation or appearance of the accused calculated to cause prejudice against him in the minds of the jury. Many, again, specified cases where the issue was one rather of law than fact, or where the accused was seeking the advantage of a technical defense, or where fine distinctions had to be drawn, as between civil and criminal negligence, or between the different degrees of a crime, or as regards two or more accused who were jointly charged but unequally guilty, or in statutory offenses where conviction ought to follow only upon proof of all the elements specified in the law. So, too, others pointed to the advantage which must come where the issues or evidence were complicated, and the charge to a jury would necessarily be long and involved, pointing to the extreme unlikelihood that a jury of laymen could follow, understand and apply a lengthy and involved charge. Many felt that juries did not properly apply the presumption of innocence and the test of proof beyond a reasonable doubt, and several thought that the submission of the issue to the judge overcame the advantage which the prosecutor often has from the popular assumption that he only arraigns those whom he has himself tried and found guilty, and from his acquaintance with former jurors and the subservience of the "professional juror" to him. Advantages to the accused not so apparent were found in the opportunity afforded him, even where conviction was sure, to present in a trial to the court all the facts which might influence the final disposition of the case without the disfavor which would come from putting the state to the expense and trouble of a trial to the jury, and in the lessening of the pressure upon the attorney for the defense to secure a plea of guilty as the best way out, where the accused feels that he is not guilty but where the chances of conviction are great and by going to trial he will encounter the same disfavor.[1] The general scope of these

[1] One of the directors at the State Prison has told the writer that the hardest prisoners they have to deal with are those who plead guilty under these circumstances because of a rankling sense of injustice which preys upon their minds and causes them to feel that they have been cheated wrongfully of their liberty.

considerations becomes apparent when among the specific offenses named as most likely to go to the court are violations of the motor vehicle law and of the prohibition laws; criminal negligence; assault where the issue is self-defense or several are concerned; nonsupport; fraud; false pretenses; embezzlement; breach of trust; conspiracy; forgery; arson; rape: carnal knowledge of minor females;[1] and manslaughter by automobiles.

Much of the information just summarized was secured in answer to a question as to the determining factors which led to a choice of the court as the tribunal to try the accused. Certain other answers given to this question are of interest. Of course, the ultimate question is, in which tribunal will the accused stand the best chance of acquittal, but in answering it many things are considered, those already suggested and others. Apparently it is in most instances counsel who determine the question and his own predilections enter largely into it, as his natural preference for trying cases to the jury or the court, and the like. In making his decision, generally the attorney considers also the reputation and personality of the judge, asking whether he inclines to leniency or severity, hews fast to the law or is open to the influence of sympathy or pity, and what his attitude is supposed to be toward the particular offense, or toward the prosecutor or counsel. So the personnel of the jury or its record for the term may determine the choice. In general, if the accused has a strong case or the state a weak one, he prefers a trial to the court; but if he considers his chances of escape are slim, he prefers the jury, hoping that at least one or two may hold out for acquittal. The same considerations which lead to a choice of the judge where there is prejudice against him point to choice of the jury when he, or she, can count on sympathy or when there

[1] One attorney says: "There is one class of criminal cases wherein the system has a peculiar value, that is, cases involving offenses against women. After seventeen years of experience in the trial of criminal cases of all kinds, and from my observation of the trial of cases tried by other lawyers, I think the greatest injustice in the administration of our criminal law has been done by juries in this peculiar class of cases, but since the advent of the new system, I find that the hysteria of sympathy which usually exists with the jury in favor of the complaining witness is absent in cases tried to the court, and that the judges weight the evidence and test the evidence of the complaining witness the same as the testimony of other witnesses and apply the same standards of judging the truthfulness of her story."

Another attorney writes: "The story of abuse coming from a lisping child witness, whose ribboned hair comes to the top of the witness box, will sweep the ordinary jury to a verdict of guilty at the conclusion of its recital and if the State's Attorney has a torn undergarment, marked Exhibit A, to wave before the jurors' eyes, no further evidence is necessary and a protest of innocence by the accused and all of the evidence, tending to prove innocence goes for naught. Such a case should be tried to a court."

are extenuating circumstances not cognizable by a strict adherence to the rules of law.[1]

If there are advantages in the system for the accused, several answers to the questionnaire point out those which come to the state, in the greater expedition of business, the less time required in the trial of cases, with the consequent saving of expense, and the smaller number of appeals and reversals;[2] and suggest the particular gain which comes in the disposition of the more trivial cases in this way. So in the case of offenses of an immoral nature, the court can better curb the attendance of the morbidly curious, and avoid some unwholesome publicity. Of the prosecutors who replied only two felt that the system placed the prosecution under a handicap,[3] and one placed this largely upon the ground of the difficulties which would arise should one of two jointly charged choose the jury and the

[1] Judge Bond, in the article upon the Maryland practice already referred to, VI Mass. Law Quar. 89, thus deals with this matter: "As to the reasons which move defendants and their counsel to elect trial by the court, a judge is not the best possible informant; he is not often taken into the confidence of the defense on such points. Some of the commoner reasons are quite obvious, however. The possibility that the jury in a particular case may be unfavorably disposed toward the accused is probably the most frequent ground of the election. When, for instance, the crime has aroused much anger in the community from which the jury is chosen, or when the prisoner himself is at a disadvantage by reason of a known record, or otherwise, trial before the court alone is usually preferred. Recently a group of automobile bandits who had robbed a county bank and incidentally killed one of the officers, a crime which naturally stirred the neighborhood deeply, elected trial before the court on the charge of murder; they were all but one found guilty of murder in the first degree. Colored prisoners, who make up a large proportion of the defendants in the courts of this State, commonly prefer this sort of trial in order to avoid the possibility of racial prejudice in the jury box. Colored men charged with crimes against women nearly always elect trial by the court, I should say. . . . Trial before the court alone is often preferred when a defense is based mainly on a point of law, for the reason that in Maryland juries are judges of questions of law, as well as of questions of fact, uncontrolled by instructions from the court, and a decision on a pure question of law cannot well be obtained except by submission of the whole case to the court — once the stage of demurrer or special plea has been passed. At times I have thought the election of a court trial was made with the idea that the judge with his greater experience would penetrate a weak spot in the prosecution, or see strength in a peculiar defense, better than a jury would. . . . The judges as they go along ask questions to clear up matters for themselves. They may, without inconvenience interrupt a trial and hold it open for days until other witnesses they might like to hear are hunted up. They may hold it under advisement for days, after all the evidence is in, to reflect upon it. Sometimes the examination of witnesses suggests the existence of additional evidence which may go right to the point of final difficulty in the judge's mind and where the evidence may be on the side of the accused the judge is especially careful to bring it into the case. I have seen great benefit come to the accused from a long suspension to get such additional evidence."

[2] One attorney sums it up in this way: "If more speedy, less costly, and more dignified trials, arriving at more accurate results, are a desirable goal in the administration of justice, then the trial of criminal cases without a jury is a long step in the right direction."

[3] One of the most experienced prosecutors replied that the law did not burden the prosecution; "on the contrary, the expense is less and the work of trial and preparation is easier and the result is more speedily obtained."

other the court;[1] while bench and bar were almost unanimous in the view that the system did not unduly burden the state, and several were emphatic that it was a positive benefit.

Judge Andrews' argument that judges are not sound triers of the issues of fact in criminal cases finds some support in the answers to the questionnaire. The predominating feeling among the prosecutors is that juries, on the whole, reach as accurate results as do the judges. On the other hand, most of the judges feel, perhaps not unnaturally, that they can determine the question of guilt or innocence more accurately than can the jury, and of the lawyers a very large proportion, some eighty per cent, support that view. Nor is it considered by judges, prosecutors or counsel, with a few exceptions, that the system imposes an undue burden upon the judiciary, although several, including five of the judges, consider it inadvisable to ask a single judge to determine charges involving the death penalty,[2] some suggesting that at least two or three judges should preside in such cases; and a few think that others of the more serious offenses ought not to be left to the decision of one man.

To conclude in a word: The replies to the questionnaire were sufficient in number and the experience of the writers under the law so varied, that they may be taken as fairly representative of the judgment of the bench and bar of Connecticut. In the light of that judgment, there can be no doubt that the law has worked successfully and there is no reason to believe that it will not continue to do so, except, perhaps, in cases involving capital punishment.

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[1] Again quoting Judge Bond as to the practice in Maryland: "There is some difficulty in the situation which results from a difference in the elections of two or more persons jointly indicted, and who should be tried jointly. I am informed that in one of the judicial circuits of the State it has been held that both must take a jury trial if one elects it, but this is, I believe, at odds with the practice elsewhere. In the other counties it has apparently been the practice in that situation to try the prisoners separately, holding two trials; the difference in elections has been treated as compelling a severance. In Baltimore City it has been the practice, for some years, at least, to hold the joint trial unaffected by the difference; the judge and the jury have been hearing the evidence of the witnesses once for all, and while the jury has been out, instructed to confine its verdict to defendants who have elected a jury trial, the judge has rendered his verdict as to the remainder. Recently the Court of Appeals has held this city practice not permissible."

[2] I am not aware that as yet any charge of first degree murder has been tried without a jury. In that respect, the law has not had a fair trial. One wonders whether there might not develop an unfortunate situation should some notorious murder trial such as the Loeb-Leopold case in Chicago, come before a single judge for decision. On the other hand, we have had ever since 1846 a law which permits one charged with murder to plead guilty, and this makes it the duty of the judge to determine the degree of the crime, and, while it has been invoked, not rarely, there has been no substantial criticism of its operation.

THE PROBLEM OF APPELLATE REVIEW.

(From an Article by Prof. Edson R. Sunderland of the Law School of the University of Michigan in the Texas Law Review for February, 1927.)

The Right of Review.

A right of appeal involves the existence of a hierarchy of courts, and a hierarchy of courts presupposes a somewhat highly developed political system. Hence in early times the court of first instance, as the immediate delegate of the judicial power of the government, heard and disposed of cases with absolute finality. Such was the situation in Rome in the simple days of the republic, and it was only with the more elaborate organization of the empire that a system of judicial appeals came into existence.[1] The same situation was repeated in England. In the twelfth century there was no appeal from inferior courts to the king's court, although there were methods of removing cases before judgment. The ecclesiastical courts, however, deriving their organization from Roman sources, became a model which finally brought into existence a civil system of judicial review.[2]

Once the principle of judicial appeal is established, a conflict arises as to how far it should be carried. The pressure for extension comes from defeated litigants because of their hope of faring better on a further hearing, and from the legal profession because it enlarges the scope of their business. Resistance comes from the public, who see no virtue in protracted litigation and no reason for maintaining courts at public expense for the benefit of stubborn and contentious parties who have already had as much consideration as they are entitled to.

There are really two questions involved. In what cases should appeals be permitted, and at what stages should those appeals take place. Assuming that a case falls within the class where appeals are advisable, should the review be postponed until final judgment and a single appeal be taken therefrom, or should appeals be allowed from interlocutory orders as they are made? On neither question is there any unanimity of views. In general it is better to restrict appeals to matters of sufficient importance to justify the expense to the public and to the parties, but there is absolutely no test for measuring the importance of cases which has ever met with general approval. A case involving $100 is considered important enough to go to the Supreme Court of Kansas,[3] but nothing less than $4,500 will suffice for review by the Supreme Court of Missouri.[4] In Michigan every case which can be tried in the circuit court can be re-

[1] Hunter, Roman Law (4th ed. 1903), 1044.
[2] 2 Pollock and Maitland, Hist. of English Law (2d ed. 1899), 664–666.
[3] Kan. Gen. Stat. (1901) § 5019.
[4] Mo. Laws (1901), p. 107.

viewed in the Supreme Court,[1] while in Texas the disagreement of the judges of the Court of Civil Appeals makes the case worthy of review by the Supreme Court.[2] It is very common to allow appeals in all cases involving taxation, or title to land, or franchises, or the validity of legislation.

There is one thing to be said in favor of no restrictions at all, — it will save an immense amount of useless litigation over the question whether parties may or may not appeal particular cases. Every restriction to ward off appeals creates litigation over the force and effect of the restriction itself. Machinery to save labor may become so complex as to waste more labor than it saves.

On the other question, whether the appeal should wait for the final judgment, there is a better chance for intelligent experimentation. The problem here is primarily one of conservation of effort. If the interlocutory order is reviewed at once it may render subsequent proceedings unnecessary, as in the case of an order granting a new trial, or an order bringing in a new party or a new cause of action, or an order which in effect determines or involves the merits, in all of which cases there will be a definite advantage of convenience in proceeding immediately with the appeal. Such an appeal may sometimes prevent irreparable injury, as in cases of granting, refusing or dissolving injunctions, or ordering the sale of property. On the other hand, courts would be utterly paralyzed if there were no restriction upon the right to take an appeal upon every order or ruling which either party wished to challenge. Where is the line to be drawn? It is a question to be solved by experience alone, and as experience furnishes very complex, incomplete, and unintelligible data, there is no reasonable hope of ever settling the problem finally. It will doubtless continue to be treated experimentally, with frequent alterations to meet the shifting opinions of those in a position to influence legislation.

One aspect of the problem has been too little considered in the United States, and that is the economic as well as political value of better trial procedure and more capable trial judges. If the efficiency of the trial court were improved, in both the inferior and superior grades, litigants might be more willing to accept the decision and forego any appeal. It may be that the immense volume of appeals which we suffer from is an indication of a want of confidence in our courts of first instance. The direct cost of appeals to the parties and to the state, and the indirect cost to society and industry of the delays resulting therefrom, represent the saving ideally possible if trial courts could function to the entire satisfaction of litigants. Courts never do and never can satisfy all parties, but there is certainly a marked difference between the number of appeals from judges who are

[1] Mich. Pub. Acts (1919), No. 14.
[2] Tex. Rev. Civ. Stat. (1925) art. 1728.

felt to be unusually capable and from those whose ability is not respected. In the absence of statistics one can only speculate as to the extent of this difference. It is worthy to note, however, that England, whose judicial system works much better than ours, spares no pains to obtain the very highest grade of judges in her trial courts. English county court judges have a jurisdiction practially equivalent to our justices of the peace. They must be barristers of at least seven years standing, are appointed for life by the Lord Chancellor, are paid a salary of $7,500 a year, and are entitled to an annual disability pension of $5,000.[1] The judges of the King's Bench and Chancery Divisions have a jurisdiction equivalent to our circuit or district courts. They must be barristers of at least ten years standing, are appointed for life, are paid a salary of $25,000, and are entitled to a pension after fifteen years service or upon disability of $17,500 a year. The Lord Chief Justice is not an appellate judge, but a trial court judge; his salary is $40,000, and his pension is $20,000. The judges of the Court of Appeal receive no higher salaries than the judges of the trial courts. The English instinct for judicial administration has always recognized the trial, rather than the appeal, as the primary field of court operation. Until 1907 no review for errors committed during the course of the trial was provided for in criminal cases.[2] A high class trial bench has been the very cornerstone of English judicial policy. The Judicature Act of 1873 abolished the appellate jurisdiction of the House of Lords, but before it became operative a conservative reaction of feeling came to the rescue of that historic appellate tribunal, largely on sentimental grounds. With trial judges fully equal in ability and professional standing to the judges of appeal, there is far less inclination to question their decisions. Correcting errors on review is a clumsy and unsatisfactory substitute for trying the case properly in the first place. If Mr. Henry Ford ran his factory on the theory which we adopt in our courts, allowing his cars to be built under the direction of mediocre shop superintendents and only using his high class men to inspect for errors after the work was done, and to send back all imperfect cars to be rebuilt, he would have been bankrupt long ago. An ounce of prevention is worth a pound of cure. The real problem of appeals is to avoid appeals, — to make our trials so efficient that appeals will seldom be asked for.

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Reviewing Tribunals.

The great number of appeals makes it necessary to provide a large number of appellate judges. How should they be organized for maximum efficiency?

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[1] County Courts Acts of 1888 and 1903, §§ 8, 23, 24.
[2] Holdsworth, Hist. of Eng. Law (1922), 217.

Inferior court appeals have usually been carried to the superior courts of general jurisdiction, which have taken care of such appellate business in addition to their work as courts of first instance. Such appeals involve small values, require prompt decision, and cannot carry a heavy expense to the parties, and the commonly employed system of a local rehearing before a judge of higher grade seems to meet the situation well enough.

The chief difficulty arises in appeals from superior courts. Should appellate jurisdiction be divided, some cases going to one court and some to another, with a possible second appeal? The federal judiciary is so organized, and many states have adopted the same plan. It is a logically attractive theory, but American experience has uncovered many serious defects.

In the first place there is a complete lack of any sound basis upon which the jurisdiction can be divided. This is evident from the diversity and confusion in the distribution of appeals between intermediate and highest courts. It can fairly be said that there is not a single question or field of the law, and not a single case, which would not fall within the jurisdiction of an inferior appellate court in some states and of the highest court in others. Some states, like Alabama, Colorado, and Georgia, send some felonies to the inferior court; some, like Illinois, Indiana, and Missouri, send no felonies at all. Some states, like Alabama and Georgia, exclude appeals affecting title or possession of land from the lower appellate court, while many others do not. Some exclude from such courts all appeals relating to public offices, others deny them jurisdiction over franchises or freeholds. In other states habeas corpus, divorce and alimony, ordinances, construction of wills, equity cases, revenue matters, probate matters, injunctions, are to be found among the subjects which must go straight to the highest court, though there are more states which allow than which refuse appeals to the intermediate court in each of them. Even appeals involving the validity of statutes and the interpretation of constitutional provisions are as often assigned to the lower as to the highest court.

And not only is there no principle upon which a workable division of appellate business can be made, but the very lack of such a principle fosters perpetual amendments of the provisions regulating appeals. In 1906 Georgia, by a constitutional amendment, provided for a distribution of appeals between the Supreme Court and the Court of Appeals, and in 1916 it again amended the constitution, completely changing the basis for the distribution. Illinois has never had any rest on this subject, and after establishing a system in 1877 [1] remodeled it in 1879,[2] again in 1887,[3] again in 1907,[4] and again in 1909.[5] Indiana has enacted no less than six complete and different schedules for appeals to the two courts, in 1891,[6]

[1] Laws of Ill. (1877) 75.
[2] Laws of Ill. (1879) 169.
[3] Laws of Ill. (1887) 156.
[4] Laws of Ill. (1907) 467.
[5] Laws of Ill. (1909) 304.
[6] Ind. Acts (1891), c. 37.

1893,[1] 1901,[2] 1907,[3] 1911,[4] and 1914,[5] besides minor changes. No state has succeeded in finding a plan for distributing appeals which seems to remain in operation very long. And this will doubtless continue to be so, because every system of apportionment is only an arbitrary and capricious arrangement without any principle of logic or convenience to support and sustain it.

Furthermore, litigation constantly goes on over the interpretation of the very statutes which apportion the appeals, so that the same problem of jurisdiction emerges in the appellate procedure which we have already discussed in connection with the existence of more than one trial court.

A no less serious difficulty growing out of the use of more than one appellate court is the question of finality of decision in the lower court, so as to allow or prevent successive appeals. There is every conceivable degree of finality or lack of finality, in these intermediate appeals, found among the American states which employ such courts.

Double appeals are an economic waste and a menace to public confidence in the courts. Reversals of one appellate court by another appellate court tend to discredit the whole judicial establishment in popular esteem. This is a serious thing under present conditions. The cost and uncertainty of litigation have always been two chief complaints against the administration of justice, and double appeals certainly increase the first and emphasize the second. They often result in a final decision by a minority of all the judges who have passed upon the case. In the famous case of Allen *v.* Flood,[6] which involved a double appeal, out of twenty-one judges who participated in the decisions, thirteen were for the plaintiff, but the defendant won. A close majority decision for reversal on a second appeal will usually mean a decision by a minority of the judges involved. This constantly occurs in all states which have intermediate courts.

The recognized evil of double appeals has undoubtedly had a great influence in shaping the jurisdictional provisions of appellate court statutes, but the varying degrees of success with which they have met the problem are very striking. Many devices have been employed. Some are relatively efficient, others are not. There is probably no state where any civil action may not, under some circumstances, be carried through the intermediate court for a second appeal, so that no litigant can be sure in advance that he may not have to fight his case through two appellate courts.

Very few states have attempted to make the decisions of the lower appellate court absolutely final, for the reason, no doubt, that the highest court would thereby lose the supervisory power over the decisions of inferior courts which the constitution gives it or which it seems desirable that it should have.

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[1] Ind. Acts (1893), c. 29.
[2] Ind. Acts (1901), c. 247.
[3] Ind. Acts (1907), c. 148.
[4] Ind. Acts (1911), c. 117.
[5] Ind. Acts (1914), c. 76.
[6] [1898] A. C. I.

To fully retain such supervisory power the supreme court should have authority to bring up any case from the inferior appellate court which it believes merits its attention, and most states recognize this practice either through express constitutional or statutory provisions or by implication from the constitutional nature of the court of last resort. Thus, in Ex parte Louisville & Nashville R.R.[1] it was held that while the constitution gave *final* appellate power in many cases to the Court of Appeals, it yet vested general superintendence and control in the supreme court, and it was therefore competent for the supreme court to use certiorari to compel the Court of Appeals to follow the rules of law laid down by it.[2] But the more common practice is to expressly authorize the supreme court to order up cases from the lower appellate court for review, either by the writ of certiorari or by a mere order for transfer.[3]

Another method of maintaining the final authority of the supreme court, which is less direct and obviously less effective, is by authorizing the inferior appellate court to certify cases or questions to the supreme court for decision. This method is frequently used in connection with the proceedings by certiorari, so that a case may be sent up by the inferior court or called up by the higher court, as either court may be induced or required. The conditions under which the intermediate appellate court may or must certify a case are quite varied. In some states the certification is in accordance with the order of a majority of the judges,[4] in some the dissent or recommendation of one judge calls for a certification,[5] in other states certain classes of cases are required to be certified, such as those involving constitutional or statutory construction,[6] or cases in which the decision is in conflict with decisions of other coordinate courts[7] and in other states only questions of law are to be certified.[8]

Now it is obvious that if the final authority of the supreme court is to be fully protected, an intermediate appellate court necessarily implies either a second appeal or an application for a second appeal as a possible incident in every case. This is burdensome alike to the parties and to the courts, and the mere right to *apply* for a second appeal produces sub-

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[1] 176 Ala. 631, 58 So. 315 (1912).

[2] See also *In re* Court of Appeals, 9 Colo. 623, 21 Pac. 471 (1886); State *ex rel.* Reynolds v. Jost, 265 Mo. 51, 175 S. W. 591 (1915).

[3] California (Const. (1879) art. 6, § 4), Georgia (Const. art. 6, § 2), Illinois (Laws 1909, p. 304), Kansas (Laws 1895, c. 96), Missouri (Const. (1875) art. 6, Amend. of 1884, § 8), Ohio (Const. art. 4, § 2), New Jersey (Comp. Stat. (1910) p. 2208), New York (Const. (1894) art. 6, § 9), Pennsylvania (Laws 1894, No. 128), Tennessee (Acts 1907, c. 82), Texas (Rev. Civ. Stat. (1925) art. 1739).

[4] Illinois (Laws 1909, p. 304), Indiana (Acts 1911, c. 117, § 4), Pennsylvania (Laws 1895, No. 128), Tennessee (Acts 1909, c. 82), Texas (Rev. Civ. Stat. (1925) art. 1851).

[5] Alabama (Laws 1911, No. 121), Missouri (Const. (1875) art. 6, Amend. of 1884, § 6), Texas (Rev. Civ. Stat. (1925) art. 1852).

[6] Alabama (Laws 1911, No. 121).

[7] Ohio (Const. art. 4, § 6).

[8] Georgia (Const. art. 6, § 2), New York (Const. (1894), art. 6, § 9).

stantially the same burden upon both court and parties as the unrestricted right to appeal.

The weight of this burden was strikingly brought out by Chief Justice Hiscock, of the New York Court of Appeals, in discussing means for relieving that court, at the meeting of the New York State Bar Association in 1919. He said:

> During the last year, out of practically 400 contested motions submitted to the court, 215 or 216 were applications for leave to appeal. Of those applications, 40, or about 20 per cent, were granted. I think very likely that some members of the bar feel that they are being denied their proper and just rights by this limitation upon the right to appeal. My judgment is that between 90 and 99 per cent — I won't try to specify the exact per centum — are getting, through the application to the court for leave to appeal, precisely the same consideration and the same result that they would get if at the end of two years their appeal was regularly considered on the calendar. *Every application for leave to appeal takes precisely the same course as a regular appeal.* It is assigned in regular order to a member of the court; it is considered by all the members of the court, and it is brought up in consultation and is there disposed of.[1]

Denials of applications for certiorari or orders allowing an appeal are usually not published, but there is some data available. Thus in Illinois, where double appeals had become such an intolerable burden that an act was passed in 1909, commonly called the Certiorari Act, absolutely prohibiting appeals from the appellate court to the supreme court unless the lower court certified the case up or the supreme court itself brought up the case for further review, the persistence of counsel in seeking leave to appeal has gone far to nullify the act. In Volume 216 of the "Reports of the Illinois Appellate Courts," pp. xii–li, there is a list of all the cases from the appellate courts reviewed by the supreme court during a period of a little less than three years, from 1917 to 1920, together with applications for certiorari which were denied by the supreme court. There are about 329 cases in this list, and just one-half of them were denials of petitions for certiorari. In 1923 the situation had become even worse, and out of 578 appeals from the appellate court, 309, or nearly 54 per cent, were denials of petitions for certiorari.[2] The list of cases from the Courts of Civil Appeals reviewed by the Supreme Court of Texas in 1923 shows 113 applications for writ of error refused as against 132 cases retained for decisions on the merits of the appeal.[3] It also appears from this list that the Supreme Court of Texas dismissed 237 appeals for want of jurisdiction during that year, which was about half the total number of appeals sought to be taken. These dismissals, I take it, were largely cases in which

[1] Report of the New York State Bar Association, 1919, pp. 408–9.
[2] See 231 Ill. App., pp. xiii–xlii (1924).
[3] 114 Tex., pp. 585–605 (1925).

the Supreme Court was not satisfied that the matter was of such importance to the jurisprudence of the state as to justify the correction of the error.[1] But in any event, it appears that out of 482 appeals, 350 were given a sufficient examination to lead the court to refuse to go into a full consideration of the merits, while only 132 were accorded the status of complete appeals to be fully argued. Texas lawyers, therefore, seem to be accustomed to prepare their cases for appeal with only one chance in four that their efforts will result in obtaining a real hearing.

It is plain that the use of intermediate appellate courts has been attended with many drawbacks. Two states, Colorado and Kansas, totally abandoned their use after trying them. Such a court was established in Colorado in 1891, and was abolished in 1905. Then in 1911 a new Court of Appeals was created for a period of four years, for the sole purpose of clearing up the Supreme Court docket, thereby making it practically a temporary division of the Supreme Court, and in 1915 it finished its work and ceased to exist. The Kansas Courts of Appeals were established in 1895, to continue four years. Their jurisdiction was similar to that of other such courts. At the end of the four-year period there was not enough interest in them to continue their life and they expired by limitation, after publishing ten volumes of reports.

The two chief defects in the intermediate appellate court system are uncertainty of jurisdiction and double appeals. They can be removed only by removing the cause and establishing a single appellate court to which all appeals go for final disposition. Such a court could sit in as many divisions as were necessary, and the divisions could be located wherever convenience directed. Three judges are enough to pass on any appeal if they agree. A disagreement might be sufficient to authorize a rehearing before the division with one or two judges added. A considerable number of states have authorized the divisional organization of their courts of last resort.[2]

There is in every one of these constitutional or legislative enactments suitable provision for bringing such cases before a larger number of judges or before the entire court as should receive such additional attention. Some provide that if there is a dissent in any division the case shall go to the whole court; others authorize the Chief Justice or a specified number of associate justices to make such an order; some require all constitutional questions to go to the full court, and others prohibit any former adjudication to be overruled or modified except by the full court; some leave it to

[1] Tex. Rev. Civ. Stat. (1925) art. 1728, § 6.

[2] California, 1879 (Const. (1879) art. 6, § 2), Missouri, 1890 (Const. (1875) art. 6, Amend. of 1890), Georgia, 1896 (Const. art. 6, § 2; Laws 1896, No. 51), Kansas, 1900 (Const. (1859) art. 3, § 2), Florida, 1902 (Const. (1885) art. 5, § 2), Alabama, 1903 (Code of 1907, § 5949), Colorado, 1904 (Const. art. 6, § 5), Washington, 1909 (Const. (1889) art. 4, § 2; Laws 1909, c. 24), Oregon, 1913 (Gen. Laws of 1920, § 3045), Iowa, 1913 (35 Gen. Acts, c. 22), Mississippi, 1914 (Laws 1916, c. 152), Oklahoma, 1919 (Laws 1919, c. 127).

the court itself to decide how cases shall be assigned or referred to the full court or to divisions.

The apparent objections which readily suggest themselves do not seem to be meritorious. One is the possibility of inconsistencies between the different divisions. But this cannot be greater than the possibility of inconsistencies between an intermediate and a supreme court, or between different divisions of an intermediate court. But the danger of inconsistencies is very small, in any event, for the judges cannot personally remember prior decisions of the court and must rely upon their own study of the reports and the diligence of counsel, and it will make very little difference whether the prior decisions happen to be made by an undivided or a divisional court.

The most remarkable case of inconsistency the writer knows of occurred recently in Mississippi. In 1913, in the case of Boroum *v.* State,[1] the Supreme Court of that state decided that the right of trial by jury was not in any way impaired or interfered with by the fact that the jury was not sworn until after the evidence was in. Some years later the same identical question came before the same court and without any reference to the prior decision, and in apparent ignorance of its existence, they held that neglecting to swear the jury until after the evidence was in was a denial of a jury trial.[2] Two judges dissented in the latter case, but did not mention the prior decision. And curiously enough, so far as the writer's researches are able to discover, these two contradictory decisions by the same court are the only cases in which this question has ever been passed upon in the United States. And yet the Supreme Court of Mississippi did not sit in divisions, and both of these cases were heard and decided by the full court.

Scope and Purpose of Review.

"The common law," says Holdsworth, "knew nothing of an appeal by a rehearing of the case. It only knew a procedure in error in which only errors which appeared on the record could be alleged. It was, as we shall see, a most inadequate procedure; and it was very imperfectly mitigated partly by judicial ingenuity, and partly by small legislative improvements. The idea of an appeal by means of a rehearing of the case came into English law from the Chancery; and it was not till the Judicature Acts that the common law procedure in error in civil cases was swept away, and the Chancery procedure substituted for it."[3] It was this very inadequate proceeding in error which the United States inherited from the common law as the basis of its appellate system.

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[1] 105 Miss. 887, 63 So. 457 (1913).
[2] Miller *v.* State, 122 Miss. 19, 84 So. 161 (1920).
[3] 1 Holdsworth, Hist. of Eng. Law (2d ed. 1899), 215.

With a very few statutory exceptions proceedings in the United States, brought to review judgments at law, are proceedings in error. That is to say, the appellate court does not pass upon the merits of the decision, nor does it determine what the true decision ought to be, but it is confined to an examination of the alleged errors committed below. The question presented is only whether error of law was actually committed. If it was, the judgment may be reversed, if not the judgment should be affirmed. The essence of the proceeding on a writ of error is the assignments of error, which specify the errors complained of and constitute what is in effect the pleading in the court of error.[1] The same thing is accomplished in certiorari by specifying the alleged errors in the petition for the writ.[2] But the appellate court does no more than determine the existence of error, and whether such error, if it exists, is prejudicial or harmless; and if there is reversible error the case is sent back to the lower court to be proceeded with according to law or as the appellate court shall direct.

It follows from these principles that no matter can be passed upon in review that was not previously passed upon below, for there can be no error without an adjudication. New questions can never be raised. Thus Chancellor Kent observed in Gelston *v.* Hoyt,[3] that "Lord Eldon said it was well known as an established rule, that no point not made in the court below could be made on appeal to the House of Lords. This is a just and wise rule; for the very theory and constitution of a court of appellate jurisdiction only, is the correction of errors which a court below may have committed; and a court below cannot be said to have committed an error when their judgment was never called into exercise, and the point of law was never taken into consideration. . . . To assume the discussion and consideration of a matter of law, which the party would not discuss in the Supreme Court, and which that court, therefore, did not consider, is to assume in effect original jurisdiction." And with true judicial loyalty to established practice, the learned chancellor exclaims: "It is impossible to calculate all the mischief to which such a course of proceeding would lead."

But the mischiefs caused by the traditional practice may also be extremely serious. In *State* v. *Garcia*,[4] Francisco Garcia and another were indicted for murder, and both were found guilty of manslaughter. In its opinion on review the Supreme Court says:

A curious fact appears in the case. Francisco Garcia, one of the defendants, became engaged in an altercation with the deceased, whereupon deceased shot Garcia and he fell to the floor, and remained there, unconscious, during the whole of the remainder of the difficulty. Cipriano Garcia, his brother, was at the time

[1] Williston *v.* Fisher, 28 Ill. 43 (1862).
[2] 4 Enc. Pl. & Pr. (1896) 145.
[3] 13 Johns. 561 (N. Y. 1816).
[4] 19 N. M. 414, 143 Pac. 1012 (1914).

at the back of the saloon where the difficulty occurred, and took no part in the same up to that time. Upon hearing the shot and seeing his brother fall to the floor, he rushed to his rescue, encountered the deceased, and killed him. No proof of concerted action on the part of the brother is shown. It thus appears that it was physically impossible for Francisco Garcia to be guilty of any crime in this connection, and he was entitled to an instruction to the jury to acquit him. Had the matter been called to the attention of the court before instructing the jury, no doubt he would have so directed them. But counsel sat quiet. Nor did counsel call the attention of the court to this proposition in the motion for a new trial. Under such circumstances, no relief can be granted here. No question is here for decision; the court below never having decided the point. . . . The remedy of the defendant, Francisco, is an application to the Governor for pardon. . . . The judgment of the lower court will be affirmed, and it is so ordered.

This monstrous sacrifice of justice on the altar of a common law procedural tradition was too much for the court, however, and on a rehearing, which they subsequently granted, they held that there was inherent power in every court to see that a man's fundamental rights are protected in every case, and that the necessity of an assignment of error upon a ruling of the trial court was a restriction upon the parties, not upon the court. But they still were unable to see their way to order a judgment for this innocent defendant, and only ordered a new trial. The case is a *reductio ad absurdum* of the common law proceeding in error.

Another rule, founded solely upon traditional practices and not at all upon reason or convenience, confined the commission of error within the scope of the orthodox proceedings of a jury trial. In Campbell *v.* Boyrean,[1] the parties had waived a jury and the court had tried the issues. The Supreme Court of the United States held that "by the established and familiar rules and principles which govern common-law proceedings, no question of law can be reviewed and re-examined in an appellate court (except only where it arises upon the process, pleadings or judgment in the cause) unless the facts are found by a jury," and "the finding of issues in fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. . . . Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled, and the exception reserved while they were still at the bar. . . . Therefore . . . there is no question of law or fact open to our re-examination." It was necessary, therefore, for the legislature to intervene and authorize the use of proceedings in error after trials in which juries were waived, if any review were to be possible.

It is next to be observed that a proceeding in error is based upon the record alone, which does not include the evidence or any matters or things

[1] 21 How. 223, 16 L. Ed. 96 (U. S. 1858).

taking place at the trial. This primarily restricts the case, as presented for review, to the writ of summons, the pleadings, the verdict or finding, and the judgment, so that the most important part of the case cannot be reviewed at all. Doubtless the early conception of the jury as a formal substitute for the old methods of proof — battle, compurgation, and ordeal, accounts for the absence from the record of all matters affecting the means by which the jury arrived at its verdict. "The jury," says Holdsworth, "is regarded as a formal test to which the parties have submitted. The judgment follows, as under the old system, the result of that test. But to ask in what manner one of the old tests worked, to lay down rules for its working, would have been almost impious; for are not the judgments of God past finding out? The record tells us that when the jury was first introduced the method by which it arrived at its verdict inherited the inscrutability of the judgments of God." [1] It is only in so far as this ancient record of the early common law has been expressly enlarged by statute that a reviewing court is able today to penetrate the veil of mystery that concealed the proceedings before the jury. Thus the Statute of Westminster (1285, 13 Edw. I, c. 31) authorized the taking of exceptions to rulings on the trial, and the preservation and authentication of such exceptions, to be added to the record so that they could be reviewed on appeal. It was applicable only to civil cases and in superior courts, and was never employed in criminal prosecutions, and American statutes have only partially removed these limitations. It was not available in special proceedings not following the course of the common law. Statutory enlargements of the scope of the bill of exceptions are often construed, even at this day, with strictness, as though to permit an appellate court to consider any matter outside the ancient technical record was a policy of such doubtful value as to be followed only under legislative compulsion. Thus the Supreme Court of Nebraska, in Moline, Milburn & Stoddard Co. *v.* Curtis,[2] says:

> The first authority for a bill of exceptions is found in the statute of 13 Edward I, Chapter 31. The purpose of that statute, as well as all other statutes upon the subject, was to provide a method for bringing into the record what otherwise would not appear there. These statutes have received a uniformly strict construction. . . . They have never been extended beyond their letter.

As distinguished from the proceedings in error employed by the common-law courts, equity used an appeal, which was a complete rehearing of the case, or so much of it as was questioned, as to both the law and the facts. On this rehearing the appellate court had power to consider the entire merits of the case in the light of the decision below, but it was not bound

[1] 1 Holdsworth, Hist. of Eng. Law (2d ed. 1899), 317.
[2] 38 Neb. 520, 57 N. W. 161 (1893).

by the decision below even upon matters of fact. The appellate court was supplied with a full transcript of all the proceedings, so far as they were relevant to the questions raised on review, so that it was as well qualified to make a final disposition of the case as the trial court would be, in consequence of which cases were not usually sent back, as at law, but were finally disposed of by this reviewing court.

It is to be noted that equity never adopted from the law courts the idea that part of the proceedings should be recorded and part should not. It never gave a higher value, for example, to the pleadings than to the proof, nor developed an appellate system which was founded on anything less than the entire case as tried below. On a review in equity the question was not as to the commission or non-commission of error, but whether the case had been rightly or wrongly decided on the merits.[1] But the case was not tried *de novo* upon appeal. The appeal rather "involved the idea of a review of the proceedings in a trial which has already been had, and not a new trial of the case."[2]

In reviews both at law and in equity, accordingly, the secondary character of the proceeding was strictly observed. No new questions could be considered. New evidence was never admitted in the House of Lords in a chancery appeal, and if evidence offered below was rejected and therefore not passed upon by the trial court, the House would not receive it, but would remit the case to be reheard below.[3] In cases at law new evidence could not ordinarily be received and passed upon without interfering with the jurisdiction of the jury over questions of fact, and this was the ground upon which it was often rejected. But the real basis for rejecting all evidence was that it was deemed inconsistent with the position of the reviewing court. Thus, the Supreme Court of Illinois would not even look at the journals of the legislative assembly to determine whether the act under which they had refused a writ of certiorari had been legally passed, on the ground that to consider any evidence not before the lower court would be an exercise of original jurisdiction.[4] The Supreme Court of Texas, in Patrick *v.* Gibbs,[5] sent a case back for a new trial rather than look at the statute of Mississippi, which was not set out in the record on appeal, to determine whether or not interest should be added to the principal of a Mississippi decree. The Supreme Court of Illinois, in Joyce *v.* Harding,[6] refused to listen to the suggestion of the death of a party prior to the decree, which had made it ineffective, but affirmed the decree. In a case where the validity of the contract in suit depended on a foreign statute,

[1] Flaherty *v.* McCormick, 123 Ill. 525, 14 N. E. 846 (1888).
[2] State *v.* Williams, 40 S. C. 373, 19 S. E. 5 (1894).
[3] 2 Daniel, Chan. Prac. (5th ed. 1879) 1432.
[4] Freitag *v.* Union Stock Yards Co., 262 Ill. 551, 104 N. E. 901 (1914).
[5] 17 Tex. 275 (1856).
[6] 208 Ill. 77, 69 N. E. 747 (1904).

the construction of which was conceded to be a matter of law for the court, the Supreme Court of Massachusetts would not consider it because it was not found in the record which came up on appeal.[1]

Now there is nothing legally impossible or inherently difficult in enlarging the scope of appellate action in law cases beyond the exceptions taken and the errors assigned, and in making the review a re-examination of the entire case upon the merits, as in equity, except in so far as it would interfere with findings properly made by a jury. If this were to be done, the importance of the technical record, as distinguished from the proceedings had upon the trial, would lose even its theoretical foundation, and appellate records at law might be made up exactly like those in equity. Actions at law tried by the court without a jury could be treated on appeal exactly like actions in equity, and where issues were left to a jury which should not have been so left, such issues could be dealt with by the appellate court exactly as though the matter had been decided by the trial court. *And we can go a step further.* There is nothing about an appellate tribunal which should render it incapable of exercising such powers of a trial court as are convenient in connection with the review and final disposition of cases, such as passing on features of the case omitted by the trial court, or considering new matters not involved in the case as tried. Such changes would place the appellate court in a position to render the maximum service in the administration of justice.

Some of these features have been adopted in whole or in part in some of the American states. All of them were adopted in England under the Judicature Acts. A single method of review was devised for all cases, and the archaic nomenclature which carried with it so much of formality and tradition, was completely discarded. Every case was to be entirely re-examined, so far as the parties found any fault with it, both on the law and on the facts, subject only to issues properly found by the jury; and it was to be finally disposed of in such a way as justice and convenience required.

In order to make it certain that the ancient limitations upon appellate power should not hamper the courts in disposing of any appeal, it was provided that "all appeals to the Court of Appeal shall be by way of rehearing,"[2] and that "the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by disposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory application, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. . . . The Court of Appeal

[1] Haines v. Haurahan, 105 Mass. 480 (1870). [2] Order 58, rule 1.

shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. . . . Such powers may also be exercised in favor of all or any of the respondents or parties, although such respondents or parties may not have appealed or complained of the decision."[1] And in further pursuance of the same principle, Order 40, rule 10, authorizes the Court of Appeal on a motion for a new trial, to give final judgment if it believes all the necessary information is before it, or to order the motion to stand over until such further issues or questions shall be tried or determined, and such accounts and inquiries taken, as it may deem necessary.

These provisions effectually destroy the doctrine that assignments of error, or their equivalents in equity, are necessary for the exercise of appellate power, for a rehearing has been defined to mean an appeal which is not confined to the points mentioned in the notice of appeal.[2]

Under this practice the appellant has been allowed in the Court of Appeal to withdraw a defense and put in a new one and adduce fresh evidence where the appellant suffered a default by the fraud of her solicitor.[3] Where a defendant omitted to ask the judge to direct a verdict in his favor on the ground of want of evidence, the Court of Appeal ordered judgment on that ground.[4] In Harris *v.* De Pinna,[5] further evidence was adduced by consent and the hearing of the appeal was treated as the trial of the action. Where an appeal is taken from the whole judgment, the Court of Appeal can vary the judgment in favor of a respondent although there is no cross appeal by him.[6] Where the evidence of a witness had been rejected at the trial, the Court of Appeal made an order pending the appeal to allow it to be taken *de bene esse*.[7] In Attorney General *v.* Birmingham Drainage Board[8] an injunction had been issued against the Drainage Board restraining it from discharging sewage into the Thames River. The Court of Appeal admitted fresh evidence that after the injunction was granted the situation had so changed that although originally properly issued, it should now be dissolved, and the decree was reversed.

"On an appeal strictly so called," said Jessel, M.R., in Quilter *v.* Mapleson,[9] "such a judgment can only be given as ought to have been given at the original hearing; but on a rehearing such a judgment may be given as

[1] Order 58, rule 4.
[2] Purnell *v.* Great Western Ry., 1 Q. B. 636, 640 (1841).
[3] Williams *v.* Preston, 20 Ch. D. 672 (1882).
[4] Branbury *v.* Bank of Montreal, [1918] A. C. 626.
[5] 33 Ch. D. 255 (1881).
[6] Attorney General *v.* Simpson, [1901] 2 Ch. 671.
[7] Treasury Solicitor *v.* White, 55 L. J. P. 79 (1886).
[8] [1912] A. C. 788.
[9] 9 Q. B. 672 (1882).

ought to be given if the case came at that time before the court of first instance. . . . It was, in my opinion, intended to give appeals the character of rehearings."

Harmless and Prejudicial Error.

The problem of prejudicial error is a problem in professional psychology. No rules can be framed which will solve it, for rules can only be drawn in general terms, and it is in the interpretation of the rules that the difficulty comes.

The doctrine of presumed prejudice from the commission of error, which was first announced in that most technical of courts, the Court of Exchequer, about 1835, and later adopted by other English courts and by the courts of most of the American states, was abolished in England by the Judicature Act. In this country we have been much slower in attacking this paralyzing rule. In the federal courts it continued to obstruct the administration of justice until 1919, when Congress abolished it by an act, amending Section 269 of the Judicial Code, declaring that "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial in any case, civil or criminal, the court shall give judgment, after an examination of the entire record before the court, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." About eighteen states have adopted similar legislation. About nine or ten states have reached the same result by judicial action. Almost a dozen states adhere more or less closely to the technical rule of presumed prejudice.

The court will follow its own views, overlooking immaterial errors if it believes in so doing, reversing on account of them if it is technically minded. Statutes accomplish something, for they keep the court constantly reminded that the public disapproves of technical reversals. But the decisive factor is the spirit of the profession. Frequently the only effect of a statute has been to change the phraseology of the decision. Instead of merely calling the error prejudicial, the court will call it a "miscarriage of justice" or they will say that it "affects the substantial rights of the parties" or they will apply any other term which the statute makes necessary. Examples of this may be found in abundance in every state which has legislated on the subject. Mr. Wigmore has traced the history of such a statute in California, showing how it gradually lost its effect on the court and was finally replaced by a constitutional amendment in the hope that such a mandate from the people would force a change in the attitude of the Supreme Court.[1]

The only permanent and effective cure for technicality in this respect is a better conception of the purpose of all procedure. In England in the

[1] 1 Wigmore, Evidence (2d ed. 1923), § 21, n. 17.

year 1924 not a single case from the King's Bench Division was reversed for error in admitting or excluding evidence. That simple fact explains why the intricacies of practice no longer annoy the English lawyer. And it explains the success of the whole judicial establishment. Procedure has become a practical means to an end. Its rules are no more exacting than efficiency requires. The human elements with which judges and lawyers deal — namely, witnesses and jurors — are subject to so many psychological factors which cannot possibly be measured or known, that it is unreasonable to expect mathematically accurate results. No one demands that a stone-mason shall show the same degree of precision as a diamond cutter, and it would be foolish to refuse to accept a job of stoné work because it did not measure up to the jeweler's standards. The common law judges overlooked this obvious truth, and were always examining masonry work with microscopes and condemning it if they found flaws. That tradition has come down to us. Hundreds of different elements enter into a verdict — the education, associations, environment, family connections, religious convictions, social habits, prejudices, ambitions, and moral character of each juror, which must be multiplied by twelve for the panel; the same elements plus the vagaries of memory, the effect of imagination and suggestion, personal capacity for observation, and the influence of interest, for every witness; the skill of the lawyers in selecting witnesses, putting in proof, and appealing to the jury; the accidents of the trial which emphasize this or that feature unexpectedly. None of these factors can be quantitatively determined, and yet the result is affected by every one of them. Their aggregate weight measures the unavoidable liability to error in either direction, and this aggregate is very large. Now it is quite clear that it is useless to demand a greater degree of precision in one element than is possible in the others which enter into a final result. If scales are accurate only within a pound, there is no value whatever in taking reading of fractions of a pound. So if the unascertainable elements in the trial give a certain accidental range of variation, it is absurd to reject the verdict because of errors elsewhere in the trial which affect the result to a less degree than the unknown elements. The common law strained at the gnat — the error in evidence or trial practice, and swallowed the camel — the vast unknown elements of personality and psychology which every lawyer knows are the powerful undercurrents which draw verdicts in one direction or another. The English Court of Appeal founds its practice on a more thorough understanding of the nature and the possible precision of a judicial tribunal. Every judgment which is reversed merely because obtained contrary to rules, shows a failure of the courts to serve the main purpose of their existence.

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AN ACCOUNT OF THE ORGANIZATION AND FUNCTIONS OF THE ENGLISH COURT OF CRIMINAL APPEAL BY THE LORD CHIEF JUSTICE OF ENGLAND.

(From an Address delivered by Lord Hewart before the Canadian Bar Association at Toronto on August 24, 1927, reprinted from the "London Times" of August 25.)

The Court of Criminal Appeal in England was constituted, as you know, by the Criminal Appeal Act, 1907, which came into operation in April, 1908. In the first instance, the Court consisted of the Lord Chief Justice of England and eight Judges of the King's Bench Division appointed by him. Experience showed that the limitation of the number of judges caused difficulty, and in the early days of the Court it was enacted that all the judges of the King's Bench Division should also be judges of the Court of Criminal Appeal. The Lord Chief Justice of England is the President of the Court. In his absence the senior member of the Court acts as president. The Act abolished writs of error, but reserved the jurisdiction under the Crown Cases Act, 1848. It is interesting to observe, however, that while there have been few cases stated under that Act since the Criminal Appeal Act was passed, in recent years there have not been any such cases.

As to the jurisdiction of the Court, you are no doubt aware that any person convicted on indictment, criminal information or coroner's inquisition may (1) appeal against his conviction on a question of law, or (2) with the leave of the Court appeal (a) against his conviction on a question of fact or any other ground which appears to the Court to be a sufficient ground, and (b) against his sentence. A person convicted and sentenced as a habitual criminal may appeal against his sentence without the leave of the Court, and a person convicted at a Petty Sessional Court and sentenced at Assizes or Sessions as an incorrigible rogue may appeal (with leave) against his sentence. Any members of the House of Lords who happen to be present may be reminded that the Act does not apply to convictions of any peer or peeress for an offence not triable by a Court of Assize. On the other hand, nothing in the Act affects the prerogative of mercy, but the Secretary of State may refer to the Court questions raised in petitions to him concerning convictions or sentences (other than a sentence of death). Where the question relates to the whole case of a person convicted, the case is considered and dealt with by the Court exactly as it would be if it were an appeal. If the question is only some particular point in a case, it may be determined by the Court in private. There have been several instances of the first kind in nearly every year since the Court was instituted. The latter procedure has been adopted on a few occasions.

A person who wishes to appeal must apply to the Court within ten days of the conviction or sentence, as the case may be, but the Court has

power in all cases, except in convictions involving sentence of death, to extend that time. An appellant has the right, if he wishes, to be present at the hearing of his appeal, unless the question on the appeal is one of law only. In practice, all appellants in final appeals are allowed to be present if they wish, but not in applications for leave to appeal. The number of appellants, that is, "persons who have been convicted and desire to appeal under the Criminal Appeal Act," is barely 7 per cent of the total number of convicted persons who have the right of appeal. The highest number of appellants was, I think, in the year 1910, when there were 712 appellants. An examination of the record shows that the number of appellants has ranged from 712 to 420 or thereabouts in a year, with an average of something like 520, while the number of cases in which the conviction was quashed has ranged from 39 to 14, and the number of cases in which the sentence was reduced has ranged from 47 to 17 in a year. A single Judge of the Court, who does not sit in open Court, has power to grant or refuse leave to appeal and to deal with other subsidiary applications. But an appellant, if his application is refused, has the right to have his application heard by the full Court.

In practice, applications for leave to appeal are usually, but by no means always, in the first instance determined by a single Judge. Many cases never reach the full Court at all. Appellants at present have the absolute right to abandon their appeals or applications and many exercise this right. Sometimes they abandon their appeals before their case is considered at all, either by a single Judge or by the Court, sometimes after the single Judge has refused leave to appeal. During last year, for example, 101 appellants abandoned their appeals or applications — 57 before their cases had been considered at all by either the single Judge or by the Court, 44 after the single Judge had refused leave to appeal. The Court of Criminal Appeal, when it is duly constituted for the hearing of appeals, must consist of not fewer than three Judges, and may consist of a larger number if the Chief Justice so directs, but the number sitting must be uneven. As a rule the Court consists of three Judges. In some 30 or 40 cases since the Court was created, it has been constituted with more than three Judges. In one case, the Court consisted of 13 Judges. The Chief Justice always sits if possible, and when he sits, presides. The Court sits in London, but it may, if the Chief Justice so directs, sit elsewhere. In fact, it has never yet sat out of London.

To dispose of the cases coming before it the Court in recent years has sat, on an average, about 40 days each year. In 1924 it sat on 41 days; in 1925, on 42 days; and last year, on 35 days. There always has been one sitting of the Court during the Long Vacation, about the middle of August. The average time that elapses from the receipt by the Registrar of a notice of appeal, or application for leave to appeal, till the matter is finally determined by the Court is from four to five weeks. The length of time varies

from various causes — for example, some shorthand writers send in their transcripts more promptly than others, and when a trial has been very long, more time is needed for the copying of documents and the preparation generally of the case for the Court. During the time that passes between the sending to the Registrar of the notice of appeal and the final determination of the appeal or application a prisoner is "specially treated as an appellant," that is, certain privileges are accorded to him in prison. But, unless the Court gives a direction to the contrary, that time does not count as any part of the appellant's term of imprisonment or penal servitude under his sentence. In unsuccessful appeals or applications the general practice of the Court has been that it does not give any direction that the time shall count, unless leave to appeal has been granted.

The result is that in most cases of appeals or applications that have no merits the appellant is kept in custody about four or five weeks longer than he would have been if he had not appealed or applied for leave to appeal. That circumstance contains really the only check which the Court has on frivolous appeals or applications for leave to appeal. The Court, it is true, has power to increase a sentence, but only on an appeal (not on an application for leave to appeal) against sentence. Nor can it increase any sentence in consideration of any evidence that was not given at the trial. But the power to increase sentences has not, in fact, been often exercised. During the past 19 years sentences have not, I think, been increased in more than 14 cases. And in every case of increase of sentence an appellant has always been expressly warned by the Court beforehand of its power, and the appellant has therefore had the opportunity of abandoning his appeal.

The experience gained by the Court of Criminal Appeal in England in the matter of frivolous appeals has led to an interesting provision in section 2 (3) of the Criminal Appeal (Scotland) Act, 1926, which provides that on an appeal against conviction the Court may quash the sentence passed at the trial and may substitute another sentence, whether more or less severe. That is a power which the English Court does not yet possess. There have been many instances where an appellant has made a frivolous appeal against his conviction and, though the Court has been clearly of opinion that the sentence passed at the trial was inadequate, it has had no power to deal with the sentence at all for the reason that the appellant did not appeal against sentence. It is hoped that the power of the Court in Scotland to increase an inadequate sentence may in Scotland prevent some frivolous appeals against convictions.

It remains to mention one or two minor matters. A shorthand note of all the proceedings on every indictment tried at every Court of Assize or of Quarter Sessions in England and Wales is taken by a shorthand writer appointed by the Lord Chancellor and the Lord Chief Justice of England. No official shorthand note, however, is as yet taken of the proceedings or

judgments of the Court of Criminal Appeal itself. Such a note, strange to say, is never taken unless a shorthand writer is specially instructed by some person interested in some particular case. In every appeal or application for leave to appeal the Registrar obtains from the shorthand writer of the Court of trial a transcript (and a carbon copy) of the proceedings at the trial. Copies of the transcript and of other necessary documents for the use of the Judges and of the Director of Public Prosecutions are afterwards made in the Law Courts.

Meantime, the expense of the Court of Criminal Appeal is very slight. The total amount of the expenses of the Court paid out of money provided by Parliament has been during the past three years £11,730, £11,929, and £12,963 respectively. Those payments cover all payments to shorthand writers for their fees and expenses for attending the Courts of trial, and for all transcripts supplied by them and all copies made in the Law Courts, and the expenses of the Criminal Appeal Office. They do not, of course, include any part of the Judges' salaries nor of the Registrar's salary. But that indispensable official, invaluable as his services are, receives, as Registrar, no additional salary. Some payments, in addition, are made out of local funds, and amount to about £500 a year. Those are the expenses of bringing prisoners to the Court, fees of counsel assigned by the Court, and the like. Also, a small sum, amounting usually to about £250 a year, is received in the Criminal Appeal Office for copies of documents supplied to appellants or their solicitors. It remains only to add that on the hearing and determination of an appeal or any incidental proceedings under the Criminal Appeal Act no costs are allowed on either side.

Such, then, is the Court of Criminal Appeal in England. There was, as you know, a good deal of opposition to its creation. Many sensible and experienced persons, who saw no good reason why even a small money claim on the civil side should not be carried to the Court of Appeal and possibly to the House of Lords, vehemently objected to a Court of Criminal Appeal even for the gravest conviction or the most severe sentence. Those voices, no doubt, still linger, but perhaps they become more and more rare. Competent observers in general perceive not merely the utility of the Court but, indeed, its necessity. It is not so much that a conviction is sometimes quashed, or a sentence is sometimes reconsidered. What matters, and matters profoundly, is that everybody engaged in administering the criminal law, upon whatever rung of the ladder he may be, throughout the whole hierarchy, is well aware that a Court of Criminal Appeal is in existence. The consequences of that diffused and abiding knowledge are quite incalculable. As Robert Burns said of something else: —

> What's done we partly may compute,
> But know not what's resisted.

If any one has any real doubt upon the matter, let him contrast and compare, for example, the summing-up in a criminal case tried to-day with the summing-up in a criminal case tried 50, 40, or even 25 years ago. Speaking for myself, at any rate, I have not the smallest doubt that, among the many duties which belong to the Lord Chief Justice of England, there is none more important than his duties connected with the Court of Criminal Appeal.

SUGGESTIONS FOR RELIEVING THE BURDENS OF THE SUPREME JUDICIAL COURT.

(Submitted to the Judicial Council by Edward F. McClennen, Esq.)

It is a human frailty — not un-American — this uncontrollable impulse to volunteer opinions on subjects with which the writer is not qualified by combined intellect, study, and experience, to treat. Be this, and the imperative necessity to relieve the burden on the Supreme Judicial Court, the apology for what follows.

It is evident to all who have given it due consideration, that the Supreme Judicial Court as now constituted cannot go on indefinitely carrying the burden of appellate work, as it is now conducted, and with reasonable hope of administering justice as expeditiously and as satisfactorily to the people of the Commonwealth as till now. This impossibility is not because the present justices of the Supreme Judicial Court and of the Superior Court fall below — in learning, in administrative ability, and in faithful and painstaking performance of duty — the best standard which the Commonwealth can maintain and the appointing power meet. Nor is it due to any inadequacy of the judicial structure to meet the needs of the Commonwealth existing when it was erected. It is due to a growth in population, wealth, complexity of society and litigious disposition somewhat excited by a large increase in the number of lawyers insufficiently equipped and disposed to view litigation as a means of livelihood and profit exaggerated by its volume.

The object of this paper is not to deal with the many other correctives and palliatives that might help, but only with the structure of the Supreme Judicial Court and of the Superior Court, and with some of the practice therein, and particularly to gain as many accessions as possible to the ranks of those who believe that an intermediate court of appeals would be a mistake and is avoidable by better changes.

To increase confidence in trial courts is to reduce the number of appeals. The fact that trials, in the first instance, are conducted before judges who are a part of the highest court in the Commonwealth, tends to enhance confidence in their decisions. The main purpose of the courts is to determine the rights of the particular litigants before them and but incidentally to announce or to establish principles, in so doing, which will enable others to know how to settle their differences without becoming litigants. The vast majority of cases have their fixture essentially determined in the trial court. For the main object to be accomplished, it is more important to have good judges in the trial court than in the court of appeals. Ignoring the many cases that end in a final judgment in the trial court without appeal, and regarding only those that are made the subject of an appeal, it still is true that the vast majority get their

final fixture from what is done in the trial court. Few cases present themselves to the appellate court arrayed as they stood before any decision below. In not a few cases the appellate court which decides a general principle so as to affirm the judgment of the trial court, would have decided the whole case contrary to the decision of the trial court, and conversely, when it reverses the trial court on a general principle, it would have decided the whole case in accord with the decision of the trial court if the appellate court were dealing with the case *de novo*. Consequently, the administration of justice will be little if any more perfect than the quality of the trial court, however excellent may be the court of appeals.

From this it would follow that the best structure for this Commonwealth would be a Supreme Judicial Court which was at once the trial court and the court of appeals in all cases, civil and criminal, not left with small cause courts. In order that this change should not be a mere form but that it should bring in to the trial court the best judges in the Commonwealth, all the judges with the possible exception of the Chief, should rotate through the appellate department of the court. The Chief and a small number of associates should constitute the appellate department, with adequate provision for submitting to a more numerous body those cases in which there is a division of opinion or a grave enough doubt to warrant such submission. In this way, there would be brought to the trial court, judges who were frequently writing opinions of the Supreme Judicial Court. They would be farther removed from the temptation to take the easy-going position that it mattered little which way they decided because their errors would be corrected by a higher court. The responsibility for opinions to stand permanently in the reports, would tend to improve the quality of all their work. The dignity of membership in the highest court in the Commonwealth would attract to the trial court lawyers who would hesitate to make the financial sacrifice for a less dignified position. Of course it is not overlooked that it is more difficult to find thirty-five or forty judges of first quality, than seven. However, it is noteworthy that in thirty-five years, with the exception of Chief Justice Rugg and Mr. Justice Loring, every appointment to the Supreme Judicial Court has been of a lawyer who had consented to leave practice to go on the Superior Court. If the Supreme Judicial Court is to be made up in this way, of Superior Court judges, one of two results follows. Either the quality of the Supreme Judicial Court is in accordance with the average quality of the Superior Court, or below it; or else the average of the Superior Court is being reduced by moving the best of it into the Supreme Judicial Court. If the Supreme Judicial Court were constituted today, or next year, of the sitting members of that court and of the Superior Court, and subsequent appointments were made directly to the Supreme Judicial Court, it seems clear that the trial department of the court would be, gradually, an improvement on the Superior Court, recruited as it is

at present, and that the quality of the appellate department would not be lowered.

What has been said so far relates to the effect on the trial court. In addition, there would accrue to the appellate department the great advantages flowing from current experience with the administration of the trial courts.

It will hardly be doubted that the number of appeals will be relatively fewer as the confidence in the judicial wisdom of the trial court is increased. That increase is to be expected if the trials are before judges of the highest court in the Commonwealth. If this proposal is attacked as radical, the counter is more, that is reactionary. When Lemuel Shaw became Chief Justice in 1830, substantially all the original jurisdiction in equity and a very large part of the original jurisdiction at law — civil and criminal — was in the Supreme Judicial Court. Even after 1900, the court was exercising this equity jurisdiction and was trying actions of contract and jury issues in will contests.

The conception that cases should be tried out first in an inferior court and its errors corrected by a higher court, is wrong. A very large part of the lower court's errors cannot be corrected because they relate so much to the more-or-less of the particular case and the application to it of the general principles which in themselves are no longer in controversy. The reason for an appellate court is that it is important to have trials conducted with promptness and before decisive judges, with an opportunity for a review of those errors which the best of judges will commit if they are obliged to act without delay for investigation and without an opportunity for putting their views to the test of conference with other judges. The effort should be to have the decision of the trial judge create just as much confidence in his probable correctness as if it had been made by the chief judge of the appellate court under like requirements for haste, and absence of conference.

The greater difficulty with the present proposal for the virtual fusion of the Superior Court into the Supreme Judicial Court is that of obtaining sufficient approval of the plan from the bench and bar, and from the public generally, to secure the necessary legislative action, or changes, if need be, in the constitution.

The carrying into the enlarged Supreme Judicial Court of the present justices of the Superior Court is not a necessary feature of the plan, but it would be manifestly wrong for the Commonwealth to depart from the substance of the invitation pursuant to which these men were induced to accept appointments to that court. Also, there is no reason to believe that if the justices of both courts ceased to be such, thirty-five men would be selected from the Commonwealth who would be an improvement over the justices now sitting.

The opposition to be expected to the plan of a Supreme Judicial Court which is both the great trial court and the appellate court is so considerable that it might go far toward defeating the success of the plan even if it was adopted. Therefore, the suggestion is not put forward as one upon which to concentrate reform energy at this time.

The next relief, if the Supreme Judicial Court is to remain mainly an appellate court only, is to take away the greater part of the remnants of original jurisdiction which it now has. The exercise of this jurisdiction subtracts a substantial amount of time from the appellate work, without bringing the justices of the Supreme Judicial Court enough in contact with original trial work to have that current experience of any particular value in handling the appellate work.

The next suggestion is the reduction of the number of justices required to dispose of an appeal. Three has been found to be a workable number in the circuit courts of appeal and in appellate courts in some other states. It is not certain that this smaller number does not tend to bring the judges hearing an appeal to a more intimate consideration of the case than where the number is larger. It gives the assistance of conference and different points of view of different men. It is not essential that every appeal have the consideration of a majority of the court. Under proper change in the existing law, our appeals could be heard by a bench of three proceeding upon the understanding that fundamental principles would not be announced in their opinions where there was a decent question about their correctness, unless the proposition had the approval of a sufficiently large part of the court. In case of sufficiently grave doubt, re-argument could be had before a larger bench if the justices who had not heard the oral argument felt that they needed the assistance of such.

If this change were made, there would be available without any increase in the number of justices in the Supreme Judicial Court, two appellate benches for hearing and deciding appeals throughout the proper appellate court sitting year. It is probable that for some time to come this would be sufficient to take care of appeals even as numerous as they are probably now to be expected if no other changes are made. This method would be much preferable to any intermediate court of appeals. The decisions would be the decisions of the court of last resort in the Commonwealth. The general principles with which the opinions dealt would be settled to the full extent that the final decisions of the court of last resort can settle them. Litigants would have the greater contentment that comes from a decision of the highest court as against the dissatisfaction that comes from being told that, because of some contrivance of the law, their case cannot be presented to that court.

Before coming to the serious objections to an intermediate court of appeals attention is asked to another means of reducing the time of the

Supreme Judicial Court consumed in disposing of appeals which do not involve general principles of importance or questions open to substantial doubt.

Do away with bills of exceptions. This will save the time of the trial court now devoted to settling disputes over matters in bills of exceptions many of which do not affect the merits of the proposed appeal. It will of course be understood that "appeal" is here used in a generic sense. Let the original record in the trial court, including the testimony, constitute the record in the appellate court. Provide for uniformity of size and shape for all papers, except exhibits, so that the whole may be bound together. Where the testimony has not been written out, permit counsel to agree upon a statement of the evidence to be substituted.

Require the appealing party to file an assignment of errors, each assignment to contain a quotation of so much of the text of the record as is sufficient to present, without need of further reference to the record, the ruling complained of. Require of the trial judge a certificate of his reasons for these rulings. He will have available the services of the party in whose favor the ruling was made, to recall to his recollections these reasons and the references to any authorities which he may wish to add.

If the quotations from the record presented by the appealing party do not adequately present the question, the certificate of the trial judge will ordinarily call attention to the deficiencies. The references in the record for these will be furnished him by the party in whose favor the ruling was made. The assignment of errors and the certificate of the trial judge with respect to them, will be the only papers which need be printed or read by the appellate court. The record *in extenso* can be sent to the appellate court when it appears that there is any occasion to look at it.

It will be said that the certificate will require the expenditure of time by the trial judge. It will require less expenditure of time by the trial judge than by the appellate judges in order to find out the real questions involved, and less time than now is required to settle the bill of exceptions. In most cases the trial judge will know why he made the ruling. Requiring him to certify to his reasons will sometimes convince him of his own error. It will tend to reduce haphazard rulings. It is certainly better to have the trial judge state why he ruled as he did, than to require the appellate court to hunt into an extensive record and then to infer, as best it may, why the trial judge made the ruling in question.

It might be desirable to impose substantial costs for each assignment of error which proved not well taken. This would tend to require counsel for the appealing party to do, before he assigns his errors, the thinking which many postpone for its initial stages to the time when the brief on appeal is being prepared.

Permit the appealing party to present the assignments of errors and the certificate of the trial judge to the appellate court with a brief in support

of the appeal, if he chooses to file one. Permit the other party to file a brief within a reasonable time thereafter. Permit the appealing party to file a short, strictly reply, brief.

Treat the appeal as then submitted to the appellate court for consideration of the question whether the court will hear oral argument. Where these assignments of errors and the certificate of the judge and the briefs leave the court in no substantial doubt as to the correctness of the ruling below or the unimportance of any error in its effect upon the decision of the case, let the judgment below be affirmed without opinion. Where there is substantial doubt, let the appellate court hear oral argument.

These details have been stated in order to present a concrete plan. The details could be varied in many ways consistently with the general idea, which is, to have the appellate court informed, on paper, what the case is really about by making use of the experience of the trial court with the actual case, and before the appellate court is treated to useless oral argument.

The idea of bringing cases before appellate courts by certiorari, has been applied where there was a lower appellate court and a written opinion which ordinarily would show what the case was about. In such cases the application for certiorari is an application for permission to make a second appeal. Ordinarily there should be no second appeal so far as the protection of the rights of the particular litigants are concerned.

It is for these reasons that it is suggested that the appellate court should not decline to entertain a first appeal from the trial court but, on the contrary, should entertain it but should decline to have it supported by oral argument where there is no reason for such. It is submitted that a plan of this kind would cut down the work of the appellate court in large measure. Also, it would increase the value of the reported decisions of the appellate court. Many of the decisions now reported dealing largely with the peculiarities of the particular case, tend to increase, rather than to diminish, the doubts as to what are the general principles of law to be applied to other cases. The quantity of opinions now being turned out cannot be produced except at the expense of the distraction of the court, when preparing one opinion, by the thought of the others that must be produced without delay. This does not make for the improvement of the law.

The device of an intermediate court of appeals is objectionable for a number of reasons. Such a court would not attract as good men as would accept appointment on the highest court of the Commonwealth. Its decisions will not satisfy litigants as well as those of the highest court. Its effect upon the settlement of the law is distinctly bad. Its decisions will be binding on the trial courts, however strong the conviction that they are wrong. At the same time, there will remain the doubt as to whether the law has been properly declared and whether there is any prospect that the question will get before the court of last resort later with the result

that the trial courts will find that they have, under compulsion, been proceeding on erroneous principles. One or two illustrations — not by any means sporadic — are referred to. In February, 1923, the Appellate Division of the Supreme Court in New York erroneously decided a question of law (204 App. Div. 447). The case was returned to the Trial Term which felt compelled to follow the decision of the Appellate Division. Other cases were decided on the strength of it. When the first case came again from the Trial Term to the Appellate Division, the same decision was reached again. A dissent made it possible to carry the case to the Court of Appeals. On July 9, 1926, that court decided the case reversing the Appellate Division (243 N. Y. 295; 153 N. E. 79). There is no knowing how many cases in the trial court had been disposed of on the strength of the erroneous decision during the period of more than three years when it was the law of New York as declared by the highest court, before which the question was likely to come. During this time there was this authority preventing the trial courts from exercising their own judgment unfettered by decision of a higher court and with knowledge, at the same time, that the principle had not been established by decision of the court of last resort.

A more striking illustration exists in the Federal Courts. In 1903 the Circuit Court of Appeals for the Seventh Circuit decided an important question of patent law and public policy (123 Fed. 424). The court deemed the question in substance already decided by the decision of the Circuit Court of Appeals for the Sixth Circuit, rendered in October, 1896 (77 Fed. 288). The decision of 1903 was followed in more than a dozen reported cases in the District Courts, the Circuit Courts and the Circuit Courts of Appeal of that and other circuits. The decisions were acted upon by many lawyers in advising clients and in the preparation of contracts. Ten years later, in 1913, the question got to the Supreme Court of the United States. That court held the law to be contrary (229 U. S. 1) to what had been laid down by the Court of Appeals ten years before. The difficulty was not due to the inferiority in quality of the judges in the Circuit Court of Appeals to those in the United States Supreme Court. It is inherent in a system which provides courts speaking with the authority of courts of appeal, rendering decisions which must be followed by lower courts although those appellate courts are not in a position to announce the law with finality. The cases referred to show this. The initial decision in the Circuit Court of Appeals (77 Fed. 288) was by Judges Lurton, Taft and Hammond. One of these, Mr. Justice Lurton, was on the Supreme Court when that court, against his dissent, reached the settling decision (229 U. S. 1, 18). Judge Taft is now Chief Justice of the United States. The difficulty lies not in persons but in a system which includes an intermediate court of appeals.

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